

Volume 2

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

ORACLE AMERICA, INC.,)	
)	
Plaintiff,)	
)	
VS.)	No. C 10-3561 WHA
)	
GOOGLE, INC.,)	
)	
Defendant.)	
<hr/>		San Francisco, California
		Tuesday, May 10, 2016

TRANSCRIPT OF PROCEEDINGS

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7:20 a.m.

P R O C E E D I N G S

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(The following proceedings were held in open court,
outside the presence of the jury:)

THE COURT: Let's take up -- first I want to hand back
to you three of the packets you gave me with my rulings on the
deposition and trial transcripts. I still have the one from
John Duimovich. How do you say that name?

MR. VAN NEST: Duimovich.

THE COURT: Duimovich. Duimovich. All right.

Anyway, here is the question I have for you. If there was
a license between Sun and IBM that allowed at the time now
this -- it has to have covered the actual circumstances. If
there was a license that already allowed the use that this
witness is testifying to, then I don't see much point in
allowing this testimony.

So, on the other hand, I'm not going to just take Oracle's
word for it and Oracle has got to have a way to prove that to
me. First item of business is show me the actual, signed
license agreement between IBM and Sun that affects all of this
witness' testimony. Is there such an animal?

MS. HURST: There is, Your Honor. I have it here for
the Court. I'm going to hand up three documents: The original
technology license and distribution agreement dated 1996;

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1 Amendment No. 7 in December 2005, which extends the term for 10
2 years because the Court wants to see that it covers the entire
3 term at issue; and then I'm going to hand up an email,
4 Your Honor, between Mr. Miner and Mr. Rubin indicating their
5 understanding at the time that IBM was a Java licensee.

6 Your Honor, the license agreement and the amendments were
7 produced in discovery back in 2011. They have Bates numbers on
8 them indicating their production.

9 **THE COURT:** All right. Please hand those up.

10 Your name over there is what?

11 **MR. RAGLAND:** Steven Ragland on behalf of Google.

12 Could I have copies?

13 **THE COURT:** Your last name is what?

14 **MR. RAGLAND:** Ragland, R-A-G-L-A-N-D.

15 **THE COURT:** What is your answer to this?

16 **MR. RAGLAND:** Well, Your Honor, I'm looking at this
17 for the first time. It may have been produced among the 16
18 million documents and 16 million pages of documents that Oracle
19 produced, but it is not on any trial exhibit list that Oracle
20 has provided. It has not been marked at any deposition, and
21 there is no testimony about this anywhere. And that matters
22 for many reasons.

23 First, Mr. Duimovich's testimony was taken specifically to
24 respond to Oracle's argument that Apache Harmony was never in
25 any commercial products. That was in the first trial. They

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1 argued that in the proposed findings of fact. After the trial
2 they argued that, so we took Mr. Duimovich's deposition and he
3 testified clearly that Apache Harmony was in Lotus Notes, it
4 was in other commercial products of IBM.

5 At that deposition, the sum total of the testimony
6 regarding any license was Oracle asking does IBM have a license
7 with Sun? Mr. Duimovich said yes. This was not marked. This
8 was not presented. He did not testify about it. There were no
9 questions. And that's important.

10 The testimony we do have from Oracle's 30(b)(6) designee,
11 Mark Wayne, about licensing issues implies that whatever this
12 license may be, that -- again, we haven't had a chance to look
13 at. Whatever it may be, does not cover Apache Harmony. He
14 testified in his deposition -- and I have copies of the segment
15 to hand up.

16 **THE COURT:** I'm sorry. Whose deposition?

17 **MR. RAGLAND:** This is Mark Wayne. He was Oracle's
18 30(b)(6) designee regarding licensing issues. His deposition
19 was taken on December 3rd, 2015.

20 **MS. HURST:** Thank you.

21 **MR. RAGLAND:** And he was asked specifically -- I'll
22 hand this up. This is on page 135, Your Honor. He was asked
23 what does -- you'll see at line 6, what does that license --
24 this refers to the testimony about a license between Sun/Oracle
25 and IBM.

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1 "What does that license generally permit IBM to do?" He
2 responded, "It permits them to create products using Java, as
3 long as they add value and they're compatible and they are
4 described in binary code."

5 Now, the compatibility point is important because of
6 course the Court recalls that there was a dispute about Apache
7 Harmony compatibility being able to call itself Java, have the
8 TCK license. And Apache Harmony was never, quote, compatible
9 in Sun/Oracle's eyes. And so therefore this implies that
10 whatever this hundred-plus-page document that we were just
11 handed provides, it does not provide a license to IBM taking
12 Apache Harmony code and putting it in its products for
13 commercial use.

14 And this, Your Honor --

15 **THE COURT:** Well --

16 **MR. RAGLAND:** Go ahead. Yes?

17 **THE COURT:** Why didn't you -- the other day in
18 court -- I don't remember which Oracle lawyer it was, but they
19 said it was produced in discovery. You intentionally came to
20 court today not having looked this document up to help me out.
21 That's what you did.

22 Why didn't you go find this document from your own files
23 and study up on it so you could tell me something better than
24 what you're telling me now?

25 **MR. RAGLAND:** Well, Your Honor, because there are 60

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1 million pages of documents --

2 **THE COURT:** I'm sorry. That's your fault. You almost
3 got -- you've got a lot of lawyers in this case. You could
4 have done this. You could have found this document. Ms. Hurst
5 found it.

6 **MR. RAGLAND:** Well, we looked for it following the
7 Court's order. We looked for it. And at around 11:30 last
8 night, I was told by the discovery vendor that we found
9 something. This is -- this must be it. I haven't had a chance
10 to review it.

11 But the point is there is no witness who testifies about
12 this. It is Oracle's burden to prove that this license --

13 **THE COURT:** Just a second.

14 What do you say to the point that you didn't designate
15 this, it's not even a trial exhibit, it's never going to come
16 into evidence because Oracle failed to follow the rules? What
17 do you say to that?

18 **MS. HURST:** Two things, Your Honor. First of all,
19 just as Mr. Van Nest has asked the Court to keep confidential
20 the economic terms of agreements between Google and its
21 business partners, Oracle has the same concerns. So Oracle
22 hopes not to introduce this agreement because it's continuing
23 in effect until today and it has confidential information in
24 it.

25 Mr. Wayne testified there is a license between IBM and

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1 Oracle, and, Your Honor, there's a little bit of concern here
2 because --

3 **THE COURT:** But I know enough to know that doesn't
4 answer the question whether the license permits what happened
5 here or covers what happened here.

6 **MS. HURST:** Your Honor, I can --

7 **THE COURT:** You know --

8 **MS. HURST:** I can walk the Court through that. But,
9 Your Honor, more importantly, they knew about this license.

10 **THE COURT:** The fact that you want it confidential,
11 too bad. This is a trial. It's a public trial. You should
12 have designated it.

13 **MS. HURST:** Your Honor, they knew about this license.
14 They incorporated it into their discovery requests. They
15 served a request for admission based on this license agreement,
16 Your Honor.

17 RFA No. 386, they asked to admit --

18 **THE COURT:** I cannot go down the path -- no, no, no.
19 I cannot go down the path -- here we are in trial, and both of
20 you have screwed up on the disclosure obligations like you
21 didn't, on your side -- didn't designate any expert testimony
22 from Joshua Bloch. He's not going to testify to expert
23 testimony, period, because you didn't designate him as an
24 expert.

25 You over there didn't do some Rule 26 things either.

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1 Well, too bad. We cannot go through life in the middle of a
2 trial with each of you saying they served us with a document
3 request or an interrogatory and they knew all about this
4 problem. No. You can't -- it takes too much time to do that.
5 I've learned that the hard way. Either you follow the rule --
6 it's easy to follow the rule. You could have designated this
7 as a trial exhibit.

8 **MS. HURST:** Well, Your Honor, we can have witnesses
9 who are competent regarding the terms of the document come and
10 testify to that without introducing the document.

11 If they want to cross-examine, they can cross-examine
12 regarding the adequacy of the scope of the license, but
13 certainly we're permitted to have our witnesses testify to the
14 contents of something that was actually produced in discovery.

15 **THE COURT:** I don't know if you are or not. Possibly
16 that's true. I'm not going to rule on that.

17 Show me in here the -- let's pass that for the moment. In
18 this big thick document, what are the key pages?

19 **MS. HURST:** Yes, Your Honor. First starting at the
20 Bates page ending 829, Bates page ending 829, which is internal
21 page 6 of the document. The Court can see that there is a
22 license grant.

23 **THE COURT:** Yes.

24 **MS. HURST:** And, Your Honor, the keyword that we need
25 to look at here is *Technology* with a capital T. You see there

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1 is a grant to technology.

2 **THE COURT:** No. I don't see this, but I'm sure you're
3 right.

4 **MS. HURST:** It's in 2.1A, Your Honor, license, in the
5 second to the last line --

6 **THE COURT:** Yes.

7 **MS. HURST:** -- there is a grant there for a variety of
8 rights to the technology and source code form.

9 **THE COURT:** Yes. I see that, yes.

10 **MS. HURST:** Your Honor, then if we go to page 5, the
11 immediately prior page, there's a definition of *technology*,
12 and, Your Honor, it says, "The technology" -- it's a variety of
13 things listed there, including the technology on Exhibit A. So
14 next we're going to go to Exhibit A, Your Honor. And that is
15 at the Bates page ending 8594859.

16 **THE COURT:** Yes.

17 **MS. HURST:** And, Your Honor, there is a long list of
18 classes and variety of things here, but if you turn to the page
19 ending 862 --

20 **THE COURT:** Okay.

21 **MS. HURST:** At the bottom, there's a reference there
22 to the Java API specification. It's within the scope of the
23 license, Your Honor.

24 **THE COURT:** So that's the same thing as the declaring
25 code; right?

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1 **MS. HURST:** Correct, Your Honor.

2 And then the final relevant matter here would be the term
3 of the agreement, Your Honor, to show, as the Court indicated,
4 that it was relevant, it was in effect during the relevant time
5 period.

6 The original term of the agreement, Your Honor, is on
7 Bates page ending 850 at paragraph 10.1. The initial term is
8 10 years. So 4 years and then automatic renewals for 6 years
9 thereafter. And this, as the Court can see from the footer,
10 was a 1996 license.

11 **THE COURT:** We don't know that IBM extended it.

12 **MS. HURST:** I have that with the other document I
13 handed you, Your Honor.

14 **THE COURT:** All right. Go ahead.

15 **MS. HURST:** The Amendment No. 7 that I handed up,
16 Your Honor, which is the document that starts with the Bates
17 number ending in 5180, that's Amendment No. 7. If the Court
18 turns to the page ending 188, which is halfway through the
19 document, the Court can see Amendment No. 7 to technology
20 license and distribution agreement, and, Your Honor, right
21 there in the very first paragraph, the term is extended by
22 adding 10 years. It says each year for 6 consecutive years is
23 amended to each year for 16 consecutive years. So that extends
24 it out through, gosh, I guess that's this year, Your Honor,
25 2016. So the license was continuously in effect from 1996

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1 through 2016.

2 And then, Your Honor, if the Court looks at the email that
3 I handed up, which is an email from Mr. Rubin, it's trial
4 Exhibit 389, and Mr. Miner, who was one of the co-founders of
5 Android wrote, *Could IBM be the solution for our problem.* I'm
6 paraphrasing, Your Honor. Mr. Rubin replied IBM is a Java
7 licensee, so they can't open source their implementation.

8 Mr. Rubin understood that IBM was a licensee and this is
9 2006, Your Honor. This is the time frame of the development of
10 Android and Apache Harmony and all of that.

11 Now, Your Honor, I mentioned that Google was aware of the
12 production of this license agreement, and I'd like to hand up a
13 Request for Admission No. 386, Your Honor, which says -- this
14 is served by Google, *Defendant Google's First Set of Requests*
15 *for Admission to Plaintiff Oracle America.* Keker & Van Nest is
16 listed on the caption -- "admit that the portions of the API of
17 java.txt copyrighted by IBM and/or Taligent were licensed to
18 Sun under the terms of the technology license and distribution
19 agreement between IBM and Sun dated October 25, 1996 were under
20 the terms of any amendments to that agreement."

21 So, Your Honor, Google was plainly aware that this
22 document was produced and in fact incorporated it into their
23 own discovery earlier in the case.

24 **MR. RAGLAND:** Could I have a copyright of that,
25 please, counsel?

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1 **MS. HURST:** Can we get another copy of that printed?
2 We just had that printed. I'll have another copy printed and
3 brought in, Your Honor.

4 **MR. RAGLAND:** And I have a response as well when the
5 Court is ready, Your Honor.

6 **THE COURT:** Yes, please. Go ahead. But we need to
7 cover other things.

8 **MR. RAGLAND:** Very quickly, Your Honor, three points.
9 First, the issue of saying this is confidential, therefore
10 that's why we didn't mark it, that's a red herring. In
11 depositions, all kinds of confidential material was marked and
12 testified about so that's no -- that's just a red herring.

13 Second, as -- what was pointed out here was the Java API
14 specification as the Court noted -- as the Court knows, that
15 was a declaring code. Apache Harmony had its independent
16 implementation. We're talking not just about a specification.
17 We are talking about IBM contributing code to Harmony, writing
18 its own implementation and using the same method headers and
19 all that from Sun's Java, giving it to Apache Harmony. So that
20 is separate from any licensing issue. That is important to
21 show that IBM understood that the declarations were open and
22 free to use.

23 But additionally, there was implementing code that
24 Mr. Duimovich testified was put in to Lotus Notes and IBM
25 commercial products. So this license I'm looking at now,

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1 again, we have no testimony on it. It appears from counsel's
2 argument it relates to the specification and not the
3 independent implementation of Harmony, which is what
4 Mr. Duimovich talked about.

5 **THE COURT:** Just a second. Show me a good example
6 from the deposition excerpts about this -- the independent
7 implementation.

8 **MR. RAGLAND:** Certainly, Your Honor. If you turn to
9 page 38 of Mr. Duimovich's deposition, line 12 -- and I'll turn
10 to it myself -- Mr. Duimovich was asked, "Has IBM ever used
11 source code derived from the Apache Harmony project in its
12 products? Answer: "Yes."

13 **THE COURT:** You have to say *question*.

14 **MR. RAGLAND:** I'm sorry.

15 "Q. Has IBM ever used source code derived from the Apache
16 Harmony project in its products?

17 A. Yes.

18 "Q. Which products has IBM used Apache Harmony code in
19 its products?"

20 Objection.

21 "A. The IBM Java SDK."

22 And then if Your Honor turns over to page 39, the very
23 next page at line 10, another question:

24 "Q. Any other IBM products that use the IBM SE SDK that
25 you can think of sitting here today?

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1 **"A.** There's lots.

2 **"Q.** Can you give me a list?"

3 Objection.

4 **"A.** Off the top of my head, Lotus Notes was using it.

5 IBM commerce. There's lots and lots of products."

6 **THE COURT:** I'm not quite sure I follow. Where does
7 it say in there that IBM wrote the implementation?

8 **MR. RAGLAND:** So let me find that, Your Honor. There
9 is testimony that -- yes. So if you turn to page 53, starting
10 at line 10, there's a question:

11 **"Q.** Do you understand that at this time in 2010, Sun had
12 its own proprietary implementation of the Java class
13 libraries?"

14 Objection.

15 **"A.** Yes."

16 If you skip down, Your Honor, to line 25 of the same page
17 and it goes on to the next page:

18 **"Q.** And the core classes that IBM contributed to the
19 Apache Harmony, did they have the same package names as
20 Sun's implementations of the Java API or the same API
21 classes?"

22 Objection.

23 **"A.** They had the same class names and package names as
24 the specifications."

25 Now, this goes to contributing the same -- he says that

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1 what -- here that what they're giving to Harmony is their
2 independent implementation with the same declaring code as
3 Java, Sun's Java, but their own implementations of source code.
4 That ties up to what he said before about source code from
5 Harmony which is referred to generally as the implementing code
6 in the project.

7 And if Your Honor looks at the email that counsel handed
8 up, Trial Exhibit 389, what's said in there is IBM is a Java
9 licensee so they can't open source their implementation. It's
10 talking about implementations here. That's important --

11 **THE COURT:** Say that again.

12 **MR. RAGLAND:** Well, the email that counsel handed up,
13 Exhibit 389, refers to implementations. Again, it looks like
14 this license covers declarations and not implementations. The
15 specifications. And so that's -- so the important point for
16 Mr. Duimovich is that he testified that they contributed source
17 code, implementing code, and declarations, which were the same
18 headers as in Sun Java, but the implementation was different,
19 to Apache Harmony. Gave it to them. And Apache Harmony made
20 it available.

21 IBM also took that Apache Harmony implementing code and
22 the declarations and put it in its own products. Just from the
23 look of the license this morning, that may or may not be
24 covered. We don't know because Oracle never elicited that
25 testimony when it could have.

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1 I have to respond to this RFA point, Your Honor, and some
2 context is important. IBM has many products. Many -- many
3 Sun/Oracle products. It has Solaris, IBM Solaris, which is a
4 UNIX operating system. They have a license from IBM for that.
5 They have other commercial products -- a license from Sun, Sun,
6 now Oracle. They have other commercial products that have
7 nothing to do with Java SE 2 1.4 and 5, but have to do with
8 other products.

9 This RFA request was about Google's understanding that
10 there was other technology licensed to IBM aside from the
11 Java SE issues in this case. That's why we served the RFA.
12 Admit that the cited license here relates to something else.

13 **THE COURT:** All right.

14 **MS. HURST:** Your Honor, may I respond briefly?

15 **THE COURT:** Very briefly.

16 **MS. HURST:** Your Honor, if the Court looks at the
17 license, it says the right to use and to prepare derivative
18 works. That's exactly what we're talking about here. The
19 implementing code is a derivative work, but the implementing
20 code is also a red herring, Your Honor.

21 Google has the burden to prove if there was a custom in
22 the industry. The custom in the industry that they proposed to
23 prove is that there was a practice of using the API
24 declarations without a license in commercial products. That's
25 the custom they have to prove, Your Honor. That the API

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1 declarations were used in an unlicensed and uncontrolled
2 fashion in commercial products.

3 This license covers the API declarations. So the
4 custom -- IBM's conduct cannot satisfy their burden of proof as
5 to the custom that they need to prove here.

6 **THE COURT:** Maybe; maybe not. I have to think about
7 that. But what do you say to this point?

8 Does this license that you handed up allow IBM to use the
9 exact declaration header codes and do its own implementation,
10 but to use the exact specification and hand that over to
11 Harmony? I think your answer to that is *no*.

12 **MS. HURST:** No. They can --

13 **THE COURT:** Well, if that's true, then the license has
14 nothing to do with this.

15 **MS. HURST:** No, Your Honor. What it shows is that
16 when IBM included the Harmony code -- imagine that Harmony --
17 basically what IBM is doing with Harmony is outsourcing its
18 development.

19 **THE COURT:** But you're not coming to grips with what
20 he's saying -- this testimony does say that IBM used your
21 header codes --

22 **MS. HURST:** Yes.

23 **THE COURT:** -- and gave it to Harmony. That's clear
24 from this testimony. And you're saying the license did not
25 allow that.

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1 **MS. HURST:** I'm saying --

2 **THE COURT:** They're going to say that's proof that
3 there was a custom.

4 **MS. HURST:** No. The license allowed IBM to use it.
5 What their argument is is that IBM used it in its commercial
6 products. Mr. Ragland pointed out Lotus Notes, a variety of
7 other things. That's what Google is saying --

8 **THE COURT:** That's not --

9 **MS. HURST:** -- is the unlicensed commercial use,
10 Your Honor.

11 **THE COURT:** That's only part of it. You didn't listen
12 to what the other part of it was, that IBM, as part of this
13 Harmony project, donated to Harmony your specification lines.

14 **MS. HURST:** Your Honor, there's no right to
15 sub-license in here so they can --

16 **THE COURT:** That's the point. They thought it was
17 okay to do it.

18 **MS. HURST:** They could have Harmony prepare it for IBM
19 to use, Your Honor. If Harmony prepared the implementations
20 and gave the code back to IBM and IBM then commercialized it,
21 IBM had every right to do that understand this license for
22 itself.

23 What it could not grant the right to do was for Harmony to
24 give it to anybody.

25 **THE COURT:** But everybody knew that Harmony was not

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1 going to just be IBM's toady and that the whole world was going
2 to have access to it. I don't buy that.

3 **MS. HURST:** Well, Your Honor, Apache --

4 **THE COURT:** That's what open source means. It was an
5 open source project.

6 **MS. HURST:** No. It means there were restrictions,
7 Your Honor. There were restrictions in this license. IBM had
8 the right under 2.1A to have prepared derivative works, if they
9 wanted to, of the technology. That includes the API
10 specifications.

11 The Apache Harmony implementation is a derivative work.
12 We know that because we have a verdict in this case that
13 Android, based on those 37 packages, is infringing. And that
14 makes it a derivative work, Your Honor.

15 And so what IBM had the right to do for itself was to have
16 prepared derivative works, and if Apache made one and gave it
17 back to IBM, IBM could license -- had a license to use that in
18 its products.

19 That doesn't mean the rest of the world had a license.

20 **THE COURT:** All right. That's your position. And I
21 will take that into account. We have to bring it to a close.

22 All right. If anyone is going to submit anything else in
23 writing, it's got to be done by noon today. You've got tons of
24 lawyers who can get it done by noon today if you're going to
25 submit anything more.

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1 In the meantime, Duimovich -- how do you say it again?
2 Duimovich.

3 **MS. HURST:** Duimovich.

4 **THE COURT:** He's not going to be allowed -- we're not
5 going to use this yet.

6 We are going to go to Joshua Bloch. I'll just say there
7 will be no expert testimony from Joshua Bloch. Does anyone
8 want to argue with me on that?

9 **MR. RAGLAND:** Yes, Your Honor. I think we would like
10 to be heard briefly on that.

11 **THE COURT:** You better have a good -- look, go ahead.

12 **MR. RAGLAND:** Mr. Kamber is going to --

13 **THE COURT:** Go ahead. Tell me how you're -- you hold
14 them to Rule 26, I'm going to held them to Rule 26.

15 **MR. KAMBER:** Absolutely, Your Honor.

16 **THE COURT:** The first time he says anything that is an
17 opinion, his expert opinion, then I'm going to jump on it.
18 What do you say to that?

19 **MR. KAMBER:** I don't know if it's useful, Your Honor.
20 We did prepare a pocket brief response to the objection that
21 was filed.

22 **THE COURT:** Tell me verbally. Hand it up and I will
23 look at it later.

24 **MR. KAMBER:** I'll give you --

25 **THE COURT:** I don't have time to read it right now.

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1 **MR. KAMBER:** I will give you the explanation,
2 Your Honor.

3 The objection, as I understand it, is that Dr. Bloch --

4 **THE COURT:** How do you mean as you understand it?
5 Come on.

6 **MR. KAMBER:** The objection --

7 **THE COURT:** It's as simple as day. This is one that
8 is simple. I can even understand this. You didn't designate
9 him as an expert and now you want to draw out of him expert
10 testimony.

11 **MR. KAMBER:** That's not correct, Your Honor. The
12 testimony we intend to present from Dr. Bloch is just as at the
13 last trial.

14 **THE COURT:** Don't say that. A lot of things happened
15 at the last trial that I got reversed on, so don't go there.
16 No.

17 **MR. KAMBER:** It is neither undisclosed nor is it
18 expert testimony. The fact is Dr. Bloch was an employee of
19 Sun. He's going to testify, just as he did the last time,
20 about the APIs, explain them to the jury, and as part of his
21 analysis, last time around, he testified that he understands
22 in --

23 **THE COURT:** His present understanding doesn't count
24 for anything. That's expert testimony. What he can testify to
25 is prior historic percipient facts.

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1 **MR. KAMBER:** These are percipient facts as to his --
2 as to the scope of the Java language and to what --

3 **THE COURT:** I have -- no, no, no. I'm going to just
4 tell you now, if he veers off into expert opinion, I'm going to
5 stop it.

6 **MR. KAMBER:** Understood. He didn't do expert opinion
7 last time. The testimony came in without objection --

8 **THE COURT:** I don't remember what he did. Don't tell
9 me I let it in last time because I don't remember and I'm not
10 going to go back and look.

11 You have objected on Rule 26 grounds to him. You are
12 going to live by the same rule.

13 If he veers off into expert opinion, you jump up and
14 object, and probably I'll sustain it.

15 You better proceed with great caution. I have a feeling
16 as we go through this trial, we are going to have a lot of Rule
17 26 problems, and you lawyers have goofed up. You ought to go
18 back to your clients and confess error. You didn't designate
19 enough stuff on both sides. You ought to meet and confer and
20 work some of this stuff out as we go through this; otherwise,
21 it's going to be scrambled eggs.

22 **MR. KAMBER:** Your Honor, I would encourage you to look
23 at the brief that addresses both of these issues about the fact
24 that it was both disclosed and that it's not expert testimony.
25 It's the type of testimony --

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1 **THE COURT:** It has to be a Rule 26 disclosure.

2 **MR. KAMBER:** If it's expert testimony --

3 **THE COURT:** That's what you argued the other day.

4 There was all kind of disclosure about that guy and the
5 transformative -- I forget. Which one was it that you were
6 objecting to yesterday?

7 **MS. HURST:** Your Honor, they were objecting to
8 Makowski yesterday.

9 **THE COURT:** That's right. You could make the same
10 arguments that way. It's either on the Rule 26 disclosures or
11 not.

12 **MR. KAMBER:** He was disclosed, Your Honor. He has
13 always been disclosed.

14 **THE COURT:** Show me the Rule 26 disclosure where he is
15 going to give expert testimony.

16 **MR. KAMBER:** He is not going to give expert testimony,
17 Your Honor. That's the point.

18 **THE COURT:** That's the gamble you are taking, isn't
19 it? As soon as he veers off into expert testimony -- I will
20 tell you this. Any present-day opinion is always expert
21 testimony. Always. Present-day as opposed to past, historical
22 facts.

23 **MR. KAMBER:** Understood, Your Honor.

24 **THE COURT:** Any question that begins, *Is it your*
25 *understanding*, which is leading and everything else, a lot of

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1 things wrong with that, but that's automatically going to be
2 curtailed.

3 **MR. KAMBER:** His testimony is about a book that dates
4 back to the 2003 or 2002 time period. It's a historical fact
5 that he was aware of --

6 **THE COURT:** I just promise you I can see it coming,
7 and it's going to be all jumbled up, and you are going to look
8 bad before the jury because you can't get your stuff in. So
9 there you go. It's your problem.

10 I will rule question by question when the problem comes
11 up. All right.

12 Are all the members of the jury here?

13 **THE CLERK:** Yes.

14 **THE COURT:** If there is a very short item -- I need --
15 this thing about Phipps, Simon Phipps. Oracle raises what
16 sounds like some excellent points on Simon Phipps. I don't
17 have time to argue it now, but I need a brief on Simon Phipps,
18 and he's not going to be allowed to testify until I get your
19 brief and we have an argument on it.

20 **MR. VAN NEST:** I think you ordered a time on it, 11:00
21 night. I think you gave us a time.

22 **THE COURT:** He will have to be postponed until
23 tomorrow.

24 Are we ready to proceed with the opening statements?

25 **MR. BICKS:** I am, Your Honor. Could I have a few

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1 minutes to move the podium?

2 **THE COURT:** Set it up any way you want.

3 **MR. BICKS:** And just check the sound system?

4 **THE COURT:** Please do that.

5 **MR. VAN NEST:** One question on the openings. We do
6 have this agreed-upon timeline, and I was thinking of putting
7 it up over here so everybody could see it.

8 **THE COURT:** Where is that thing? Can we put that up
9 now so the jury can see it?

10 **MR. VAN NEST:** Your Honor, you are going to read the
11 pre-instruction?

12 **THE COURT:** I'm going to read the pre-instruction
13 after the opening. You're free to use it in your opening, but
14 I'm going to do my reading after.

15 **MR. VAN NEST:** Okay. Fair enough. And then will we
16 break between the openings?

17 **THE COURT:** Probably.

18 **MR. VAN NEST:** I'm good either way.

19 **THE COURT:** I'll go by -- I can't promise you, but
20 probably.

21 **MR. VAN NEST:** Okay. Thank you.

22 (Off the record)

23 **THE COURT:** Are we ready?

24 **MR. BICKS:** Yes, Your Honor.

25 **THE COURT:** Let's bring in the jury.

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1 **THE CLERK:** Okay, Judge.

2 **THE COURT:** Members of the public, I want counsel to
3 have the undivided attention of the jury, so, please, no
4 shuffling of papers, no hacking and coughing, no going in and
5 out of the room. Total silence back there, please, so the
6 lawyers will be able to engage the jury. Thank you.

7 (Proceedings were heard in the presence of the jury:)

8 **THE COURT:** Good morning. Everyone find their seats,
9 please and have a seat. And everybody is doing great and thank
10 you for being here so punctually and on time. We had good hot
11 coffee waiting for you, doughnuts. So we're going to just get
12 right down to it, but I need to give you some pointers, so to
13 speak. This will take about five minutes and then we're going
14 to have the opening statements by the lawyers.

15 So here are some things. You see this wonderful court
16 reporter we have there working the machine with her fingers?
17 They usually lead members of the jury to think you're going to
18 have a transcript of what has been said here in court. I'm
19 sorry to say that's not true. You will not have that
20 transcript. That's for purposes of appeal. And you will not
21 have it, so that's why we give you a notepad, so you can write
22 down anything you feel you need to remember.

23 Also at the end of the case, there is a cumbersome -- if
24 the jury wants to have a read-back, we can read back, bring you
25 back in here during your deliberations, and the court reporter

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1 can read through her notes and tell you what was said, but
2 that's a very cumbersome thing, and I don't recommend it unless
3 it's really critical for your thinking.

4 So your notepads are a good idea if you want to remember
5 something. But it's up to you. You don't have to take any
6 notes at all, zero.

7 So there we are. It's up to you. You're the boss when it
8 comes to how you want to keep track of whatever you want to do.

9 I want to give you a general overview of the entire trial.
10 The lawyers are going to do that, too, so I'll make mine brief.

11 This case is a copyright case under the federal copyright
12 law. And it's Google who now owns Sun which came up with this
13 Java programming language and is suing Google. And it's not
14 over using the programming language. That everyone agrees is
15 free for anyone to use, but over something called the API, and
16 the lawyers will explain that. It's a subpart of the overall
17 Java System. And so you will hear all about that from the
18 lawyers.

19 As the case comes to you, it has already been established
20 that Google used the so-called specification from the API, and
21 the issue comes down to whether or not you determine that was
22 fair use or not. I told you the other day, *fair use* is a term
23 under the statute, and I'm going to -- later on today I'm going
24 to give you an instruction of law on that.

25 *Fair use* is a term of art under the statute, and if you

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1 decide that it was fair use, then no problem. Google is
2 entitled to use it. If it was not fair use, then Google is
3 liable for copyright infringement.

4 So you can see that's an important decision for you to
5 make and you'll want to be paying close attention.

6 If it is determined to be liable, Google determined to be
7 liable, then we go to a second phase of the case, all of this
8 to be done by June 10th at the latest. Second phase of the
9 case to consider the issue of damages, and so we will have a
10 two-part analysis.

11 The first one is the threshold issue of fair use, and
12 depending on how you come out on that, we go to the damages.
13 The fair use part will be the longest of the -- it will
14 probably take -- three-fourths of the trial time is on the fair
15 use part. And, of course, both sides are going to be
16 presenting evidence.

17 Now, even though Oracle is the plaintiff in the case and
18 normally the plaintiff gets to go first, because the burden of
19 proof on the fair use issue lies with Google, the rule is that
20 the party with the burden of proof gets to go first. So when
21 we actually start hearing the evidence later on this morning,
22 Google will present first. And then Oracle will present its
23 case.

24 So that's the overview of the case. The lawyers will do a
25 better job than me because they're really deep into the

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1 evidence and they know the case better than me, but that's
2 what -- they'll probably summarize that for you better than me.

3 Just a couple of other things. I have told you that you
4 cannot read newspaper stories. Raise your hand if you have
5 read any newspaper stories or seen anything about this case
6 since yesterday. So, good, you haven't. Please don't do that.
7 You have to be pure and not be possibly influenced by anything
8 out there.

9 There will be a lot of press about this case, and after
10 the trial is over, you can go back and read everything,
11 including what they said about you. They will have stories
12 already. I've seen them myself about some of you in the jury
13 selection process, and I know you're dying to see what they
14 said about you, but you can look at it after the trial is over.
15 Don't look at it now.

16 So you've got to do what I've said here, and the great
17 thing about a trial is it's like a laboratory experiment. You
18 sit back with your laboratory jacket on and you carefully
19 listen to what these lawyers actually present in court as
20 evidence as opposed to what they say, and then you decide the
21 case at the end as to whether it measures up or it doesn't
22 measure up, does the litmus paper turn pink or does it turn
23 blue. That's for you to decide.

24 So you can't be doing research or being influenced by what
25 somebody might tell you or newspaper story or magazine article

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1 or TV, any of that stuff. No. No. No. But at the end, after
2 you're discharged, God bless you, go for it, it's okay. But
3 not yet.

4 All right. I've beaten it to death about Twitter,
5 BlackBerry, Facebook. I'm not going to repeat any of that. I
6 think you know that by now.

7 I want to end my little preliminary remarks by saying two
8 things about the lawyers. We have some outstanding lawyers
9 that are nationally known. A few went into court in
10 Washington, D.C. or Austin, Texas or L.A., New York. You might
11 see these very lawyers before you if you were on a jury there.
12 So we're very privileged to have such outstanding lawyers.

13 But I'm going to tell you again, not one word they ever
14 say is evidence. Zero. You're going to hear two-hours' worth
15 of opening statements. Not a thing they show you, even though
16 they're going to show you some documents, none of that is in
17 evidence yet. It will probably come in into evidence, but
18 sometimes things they show you in the opening statements
19 actually can't get into evidence. So too bad for them. It's
20 not in. And nothing they say is evidence.

21 And the reason I bring this is up is that in the
22 deliberations, it is possible that one of you might say,
23 *Listen, I heard that one of those lawyers said something about*
24 *the API does this or doesn't do that* and I hope you remember to
25 say to yourself, *That was just the lawyer talking. That is not*

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1 evidence. *What was the actual evidence in the case?*

2 Sometimes the lawyers exaggerate, they just argue. It's
3 okay to argue. It's perfectly ethical to make a good argument,
4 but it may be you disagree with the argument when you actually
5 understand the evidence involved, so you need to pay attention
6 to what the evidence is, and the evidence is what the witness
7 says under oath. To give you that example I gave you
8 yesterday, if the lawyer says *was the light red* or *wasn't the*
9 *light red when you went through the intersection*, and the
10 witness says *I don't think so* or *I don't remember*, does that
11 prove that the light was red? Zero. No. It's just the lawyer
12 talking. And what the witness says is what the actual evidence
13 is.

14 So you need to keep straight in your mind -- the last
15 trial I had, afterwards, one of the jurors said to me -- he
16 said *I'm so glad you told me that because in my notes I kept*
17 *straight what the lawyers said versus what the witnesses said.*
18 *It was really true that I would have been confused by it if you*
19 *hadn't told us that up front.* Well, it's up to you how you
20 keep your notes, but I'm telling you, you need to pay attention
21 to what the actual evidence is as opposed to what the lawyers
22 say.

23 Now, just to finish that point, if the lawyer says *isn't*
24 *it true the light was red* and then the witness says *yes*, of
25 course that's evidence that the light was red because the

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1 witness agreed to it.

2 Anyway, you will be hearing a ton from these lawyers and
3 not much from me as the case goes along, so that's why I stress
4 this so much.

5 These are great lawyers. You're going to enjoy the
6 professional work that they do and be very impressed. I have
7 already been impressed by both sides, and so I'm sure you will
8 be as well.

9 I'll give you some of the other pointers as we go through.
10 I guess the one last thing, if any of you have ever been on a
11 criminal case -- I forgot, any of you ever been on a criminal
12 case? Okay.

13 In that kind of case, the burden of proof is called *proof*
14 *beyond a reasonable doubt*. That doesn't have anything to do
15 with this case. What we are dealing with here is called
16 *preponderance of the evidence*. And that's a 51-percent test,
17 more likely than not.

18 So the party with the burden of proof has to prove that
19 it's more likely than not, which means 51 percent versus 49
20 percent is enough. Or the scales tip very slightly in favor of
21 that's enough. You don't have to be proof beyond a reasonable
22 doubt. This is a civil case, not a criminal case. So there we
23 go.

24 I think that's all I need to cover for the moment, unless
25 the lawyers -- before we get started with the openings, is

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1 there anything else that you would like for me to say?

2 **MR. VAN NEST:** I don't believe so, Your Honor.

3 **MR. BICKS:** No, Your Honor. I'm ready to go.

4 **THE COURT:** So at this time on behalf of Oracle
5 America, Inc., Mr. Bicks will give the opening statement.

6 You have one our.

7 **MR. BICKS:** Thank you, Your Honor.

8 And, Dawn, could I have the system turned on?

9 **THE CLERK:** It is on.

10 **MR. BICKS:** Thank you.

11 **OPENING STATEMENT**

12 **MR. BICKS:** Good morning, ladies and gentlemen. You
13 know my name is Peter Bicks, and I'm actually thrilled now to
14 present this opening statement for the women and men of Oracle.
15 We know that we've taken you away from your jobs and your
16 lives, and I can say for both sides, thank you.

17 You probably sensed yesterday and you can sense looking
18 out here now that this is an important case with a lot at
19 stake. Ladies and gentlemen, this is an important case. And
20 there is a lot at stake. It involves fundamental principles of
21 fairness and business conduct, and in this case, how the
22 defendant Google acted outside of business-acceptable conduct.

23 I wrote over on this board a couple numbers: 100,000, 3
24 billion. By the time I'm finished with my opening statement,
25 100,000 smartphones with an Android operating system will be

OPENING STATEMENT / BICKS

1 activated and they will have Oracle's property in them.

2 Since this conduct started in about 2008, 3 billion mobile
3 phones have been activated with Oracle property in them.

4 I'm going to write over here another set of numbers. And
5 I always have to think when I write it because I'm not used to
6 writing billions. \$42 billion of revenue through all of those
7 activations, each one with our client's property in them.

8 Valuable computer code.

9 I am going to talk about what the Court referred to as
10 evidence. Everything I put up here will be talking about
11 evidence.

12 And the evidence, ladies and gentlemen, that I'm going to
13 talk to you about is evidence that came out of files of Google,
14 and it came out of those files at a time when they thought no
15 one would see the evidence that you will see in this case.

16 So I'm going to start with a piece of evidence that came
17 about 6 days before this lawsuit was filed. Something was
18 going on inside the offices of Google. This email, written on
19 the 6th of August, 2010 -- you can see on that timeline, this
20 case got filed August 12, 2010 -- was an email written by an
21 engineering named Tim Lindholm. Larry and Sergey, you probably
22 know who they are. Larry is Larry Page. Sergey is Sergey
23 Brin. Those are the two founders.

24 This engineer, Mr. Lindholm, was asked to do an
25 investigation. They knew they had a problem because they had

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1 been using Java for quite some time in every one of these
2 mobile devices.

3 He was asked to determine if they had any alternatives to
4 Java. He looked. And he wrote back "they all suck." Not my
5 words, ladies and gentlemen, the words from their files.

6 And so what did they conclude? They needed to negotiate a
7 license for Java. A license, ladies and gentlemen, is
8 permission to do something. This email doesn't say anything
9 about fair use, and you won't see any document about fair use.

10 Google, one of the largest and most sophisticated
11 companies in the world, made a deliberate business decision not
12 to take a license and to copy and use Oracle's valuable
13 software illegally. Why? Huge profits.

14 So what is this case about in very simple terms? It's
15 about decisions and it's about consequences, something that
16 each and every one of us know and teach. Decisions and
17 consequences.

18 Time was not on Google's side. And the evidence will show
19 that Google's top executives referred to in emails like the one
20 I showed you motivated by billions of dollars in profit -- and
21 I say billions -- and the fear of getting locked out, their
22 words, not mine, took a shortcut, and it was at Oracle's
23 expense.

24 When Google did that, they broke a very basic rule, a rule
25 we've all known when we were this high. You do not, ladies and

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1 gentlemen, take somebody's property without permission and use
2 it for your own benefit. That's what this case is about. And
3 that's what Google did.

4 Google took Oracle's property and, with it, Oracle's
5 opportunities, and that's why we're the plaintiff in this case.
6 And that's why we're here. And that's the story I want to talk
7 to you about now.

8 Judge Alsup told you that this is a copyright case, and
9 here is the copyright, one of the copyrights that's important
10 in this case. A copyright protects written works, things like
11 books and songs, and it also protects computer code. You see
12 on this slide Sun Microsystems. The Court mentioned Sun
13 Microsystems. They were a local innovative company that we
14 talked a little bit about yesterday. Some of you had heard of
15 it.

16 Oracle had worked with Sun for 20 years. And Oracle had a
17 license to use Java, so they knew how valuable and important
18 Java was. Oracle, as the Court has mentioned, bought Sun, and
19 when it bought Sun, it got Java. The Court has told you that
20 the computer code that is at issue here comes from something
21 called the Java 2 Standard Edition or SE. And you will hear
22 that in this case.

23 Oracle has the copyright to this code, and when you have
24 the copyright, you set the rules. And the rules are typically
25 in a license. Google didn't want to play by these rules. And

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1 that's what the evidence and this case is all about.

2 After Oracle bought Sun, they told the world that Java was
3 the single most important software asset that they had ever
4 acquired. What then exactly is Java? It's software and it's a
5 platform -- you'll hear that word -- for writing apps --
6 everyone calls them apps now, applications -- and running
7 applications. That's what it is. And Oracle, since it
8 purchased Sun, has spent hundreds of millions of dollars
9 keeping up Java, the steward of the Java community which
10 consists of millions of developers who love Java.

11 Why would the Java platform be so important to a company
12 like Oracle? Let me tell you a little bit about Oracle.

13 Here's a picture of Safra Catz. She'll come before you
14 and sit on that stand. Yesterday the comment was made by
15 Google's counsel that Mr. Ellison is the CEO. Actually he was
16 the CEO. This is the current CEO. And what she says here in
17 this graphic about Oracle is that "We solve the world's most
18 complicated technology problems."

19 Oracle is involved in many areas of technology, some of
20 which you may not know about. If you're following the Golden
21 State Warriors, you probably know the Oracle Arena, but there
22 are many things you may not know about. These are some of the
23 areas and businesses that Oracle's technology can be found in,
24 whether it's cloud computing, the iTunes store, the technology
25 at MD Anderson Cancer Center, everything from your ATM card.

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1 If, when you go to work, you have to take one of those cards
2 for security to get in, there's a good chance Oracle's
3 technology was behind that.

4 Java is key to many of Oracle's technology, so let me tell
5 you a little bit about Java so you'll see in this case and it
6 will be helpful, I hope. There are three parts to Java. The
7 first the judge talked about was something called programming
8 language. And the second are these packages, the APIs, and
9 you'll hear that phrase in this case. API is an application
10 programming interface and those are bundles, you can think of
11 them like bundles, of pre-written code, pre-written that can
12 then be used to write all the apps and programs and things like
13 that.

14 You will also hear about something called the JVM, Java
15 Virtual Machine. That's kind of like a little computer that
16 sits on whatever kind of computer you have and it runs the
17 programs, including things like these ready-to-use programs.

18 Judge Alsup will give you instructions later today, and
19 this is one of the things that he will tell you. In this
20 instruction, which will guide some of this case, he will tell
21 you that even though the Java programming language, like the
22 English language, any language, was freely usable by Google and
23 others, Google's use of the declaring lines of code and the
24 structure sequence and organization of these 37 packages that I
25 mentioned constituted copyright infringement under the Federal

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1 Copyright Act of 1976, unless you find fair use and that Google
2 meets their burden.

3 So, ladies and gentlemen, this case is all about the
4 packages.

5 What did Google take? Google copied and used the design
6 of those 37 packages and they also copied and used 11,000 lines
7 of Oracle computer code. And you may hear today that 11,000
8 lines is not a lot. *We left a lot behind*, may be a story
9 you'll hear. *We took your property, but we didn't take all of*
10 *it*.

11 Eleven thousand lines, ladies and gentlemen, is a lot of
12 computer code. It took 10,000 lines of code to power this
13 Apollo Lunar Module when lives were at stake on that module.
14 Math was never my strong suit so I had to make sure I had it
15 put up for me. That's a thousand less than what Google copied
16 in this case.

17 So what will we hear from Google? *What we did was a fair*
18 *use. We copied the design, we copied over 11,000 lines*, and
19 now it was fair use. Ladies and gentlemen, I call this case
20 the *fair use excuse*. After Google got sued, Google had to come
21 up with a way to avoid the consequences of its decisions, and
22 we're here in this case because the evidence will show that
23 Google is taking this fair-use exception and twisting it to try
24 to excuse its bad conduct.

25 Let me tell you a little bit about fair use and the judge

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1 will tell you this. You may be saying what are examples of
2 fair use? Here are some examples in the law. Criticism.
3 That's not what Android is. Comment. That's not what Android
4 is. News reporting. A news reporter can copy, show a clip
5 from something to explain a story. That's not what this is.
6 Classroom use. A teacher can make a copy to teach people in a
7 classroom. And that's not what this is either. Scholarship,
8 research. That's not what Android is all about.

9 These are examples, and then in this case, we'll have some
10 principles that the Court will tell you about that we'll see if
11 Google can go beyond these examples, which Google will never
12 suggest have anything to do with this case.

13 So what are those rules? The first question here is why
14 did Google copy Oracle's property? Was it for commercial
15 reasons or not for profit?

16 Was Google's use transformative? That's going to be a
17 word you'll hear in this case, *transformative*. It's got
18 specific legal meaning that the Court will tell you about.

19 Did Google act in good faith? Very important question.
20 The evidence will show they acted outside of the law, and you
21 will decide if that is good faith, if that is acceptable
22 conduct.

23 Is the API package design that I showed you creative, and
24 if so, how creative? That's a question that we'll focus on.

25 Are the API packages important? Why did Google take them

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1 and what did they do?

2 And then, ladies and gentlemen, did Google's copying cause
3 actual or potential harm to Oracle's Java? And a very
4 important question is what if everybody was allowed to do this?
5 What if everybody could take Oracle's property, this code, and
6 use it? What would happen? And we'll answer that question.

7 Google has the burden of proof, and that's very important
8 to remember. They need to convince you by a preponderance of
9 the evidence that what they did fits the fair-use exception.

10 I've organized for you three chapters, if you will, in the
11 story, to try to organize the evidence. The first chapter is
12 Java's success. The second is Google's decisions. And the
13 third is the consequences and harm that came to Oracle because
14 of those decisions.

15 Let's talk first about Java's success. Java solved a very
16 important problem. You may remember some time ago that if you
17 had a computer at your office that had a floppy disk and you
18 had a computer at home, that the floppy disk wouldn't work if
19 the computers were different. What this problem was, was that
20 every time a programmer wanted to write an application -- there
21 you see a Sun Microsystems computer at the top, a Mac in the
22 middle and a Windows at the bottom -- they would have to write
23 the application over again because their computer only
24 understood one language, and the languages were different for
25 each computer.

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1 If your job was to be a computer programmer, you'd have to
2 keep writing programs again and again, depending on what
3 computer you were writing for. It was tedious, it took a lot
4 of the fun out of it, and it was expensive to do that,
5 particularly on a big-business level.

6 This was the Java innovation, write once and run it
7 anywhere. You could write a program, an app, and if you used
8 Java, it could write and work on any computer. That was a
9 revolution in its time. And it made Java the ideal solution
10 for distributing computer code across the Internet because it
11 didn't make any difference what kind of computer you used. If
12 you had a Mac personal PC in Rome, a Windows PC in Boston, both
13 people at those PCs could download programs over the Internet,
14 and that was because of Java.

15 And one of the key parts to Java were the API packages
16 that Google copied. They were at the heart of what made Java
17 so valuable.

18 You will hear evidence in this case from some of the
19 people who wrote those packages because -- I've put up there
20 one of the questions is, is it creative and how creative is it
21 to do this? You will hear the witnesses in this case who wrote
22 some of these packages, and you will also hear from expert
23 witnesses. On our side, Douglas Schmidt at the top. He will
24 explain to you how putting together those codes, the declaring
25 code and the design of these packages, was highly creative.

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1 And you will also hear from an expert at Google, Dr. Owen
2 Astrachan, and he will tell you, because he has before, that
3 the design of these packages is hard, just like being an artist
4 or a concert violinist.

5 And so this is kind of a neat graphic, I think, that will
6 help you here. This is called a software map. And it shows
7 the design of these packages and how they fit together, kind of
8 like a complex blueprint to build a magnificent building. And
9 you'll see how these packages are all connected and interrelate
10 to each other. And let me show you what Google took.

11 You see the red on the screen? They took the heart of
12 these packages. And what you will learn in this case is if
13 that code is not in those 3 billion phones, not one would work.
14 They took the heart out of these packages. And let me tell you
15 this, ladies and gentlemen. You see this filing cabinet over
16 here? I can tell you right now that this heart, this software
17 map, is not a filing cabinet.

18 This technology was loved. It came out, you see on the
19 timeline, in 1995. By 2005, 4.5 million developers were using
20 Java and using these packages. This is a photograph from a
21 conference called Javapolis, 2005. More than 4.5 million
22 developers were using this after just 10 years. And let me
23 show you where it was used because it's very important in this
24 case.

25 Java became widely adopted in mobile phones, and we're

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1 going back to a time period starting around 2000, going back 16
2 years ago, a time when things were very, very different. The
3 Apple iPhone hadn't even been on the market until 2008.

4 Over 120 million Java phones were out there in 2003. By
5 2006, 1.5 billion phones were running in Java by 2006, two
6 years before October 2008, when the first Android phone was
7 released.

8 By 2007, 85 percent of all mobile phones were in the
9 market with Java in them. Java was there first. And in all of
10 these phones.

11 It wasn't just in mobile phones that Java was running.
12 Java was in technology that touched our lives in many ways,
13 from OnStar in the car to tablets to TV's to disks to PCs to
14 printers, video games, app servers and more. Java was
15 everywhere.

16 And this was known inside the offices of Google because in
17 cases like this, we get their documents from their files and we
18 can see what they knew and when they knew it.

19 In 2006, an internal Google presentation, they were trying
20 to think about what are we going to do in this phone market?
21 Who is Sun? And they knew, as they say here, that Java
22 dominates the wireless industry in 2006.

23 And now the story gets a little bit more interesting,
24 ladies and gentlemen, because now we're into Chapter 2,
25 decisions, and then we'll talk about the third chapter, which

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1 are consequences.

2 As I mentioned before, Google was a company that was big
3 in the search business, and so I typed up here -- it was
4 Mother's Day just a while ago -- so I said what would happen if
5 I wanted to get flowers? And I typed in on a laptop, desktop.
6 What would come up? San Francisco family-owned florist. And
7 you see that orange box that says ad? Every time I click to
8 pull that up, Google makes money. And what happens is that
9 information, when I type that in, Google knows, so if I go do
10 another search tomorrow and I'm searching for something
11 different, I may see on my computer screen something about
12 flowers because they knew that I had done that before.

13 And when we go back to 2004 and 2005, this is a very
14 important time, and it's very different then than it is now.
15 This is a statement from Google's public filing with the
16 Securities and Exchange Commission. Got to be accurate.
17 Google was big in the search business on things like this,
18 laptops and desktops, but the world was undergoing an
19 incredible change, something that -- today we live by these
20 phones. I have one in my pocket. But it wasn't the case 10
21 years ago.

22 People were doing searching on their desktops and their
23 laptops. The world was changing and Google said mobile phones
24 are increasing dramatically. And what they say here in their
25 filing with the Government, that if we are slow to develop

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1 products and technologies -- and it says non-PC communication
2 devices, they're talking about mobile phones -- we will fail to
3 capture a significant share of the market. That's what they
4 said publicly. They were concerned. They can fail to capture
5 a significant share of the market. Internally the language was
6 a little bit stronger.

7 BlackBerry was out on the market with Java in it. What
8 did Google do? They bought Android in 2005 to get into the
9 market. And what do some of the documents that came from their
10 files -- what will they show? Here's a picture of the
11 headquarters from the outside. In this case, we're going to go
12 on the inside and see what has happened at the time, not today
13 when people come in and want to rewrite history.

14 What did we see? "Don't get locked out."

15 Imagine Google locked out. Their words; not mine.

16 You will see in this case that when Google bought Android,
17 they had a contract; they had a deal. And the deal had some
18 sweeteners in it.

19 They had to get to the market with a phone in three years.
20 And if that happened, \$60 million could be put in somebody's
21 pocket.

22 Three years is not a lot of time to get a mobile phone
23 from scratch into the market. So I want you to hear a clip
24 from a witness you will see in this case, the founder of
25 Android who then came to Google. His name is Andy Rubin.

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1 This is what he said when we asked him some questions.

2 (Video clip played.)

3 **MR. BICKS:** "The shortest time possible."

4 Short time. The pressure was on. \$60 million incentive.
5 Emails saying that, We could be locked out. Public filings
6 saying that, We could fail and lose a significant share of the
7 market.

8 What do you think the solution was to get to the market
9 fast?

10 They needed three things. They needed something that ran
11 on many companies' phones. They needed something that would
12 get them quick time to the market. And they needed something
13 that would attract millions of app developers, the folks who
14 write the apps, those six million folks who had been writing
15 programs in Java.

16 The solution that they came up with was Java. And how do
17 we know that? Because we got the documents from their files.

18 2005, Android is building a Java operating system. The
19 number one choice for mobile developments. And the carriers
20 require it.

21 Carriers are the AT&T, the Verizons, the companies that
22 you have to hook up to run one of these phones.

23 Internally, they knew, when the pressure was on, Java,
24 because it had been in those billions of phones, was the thing
25 to take because it would be a shortcut for them.

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1 So they knew that they had to do something. They had to
2 get a license, which is the written permission, the deal to
3 take somebody else's property.

4 If do you it the right way, you get a license. And this
5 is their internal document. They must take a license.

6 And why did they know that they needed a license? This is
7 important, ladies and gentlemen.

8 There was a company called Danger. I showed you
9 Mr. Rubin's clip. Mr. Rubin worked at a company called Danger.

10 And Danger came out with a phone called the Sidekick, one
11 of the first smartphones. Also, they called it the Hiptop.
12 Don't know why they gave it two names. Most people know it as
13 Sidekick.

14 He was at Danger, and he took a license from Sun. And he
15 took a license for Java, including the packages that were used
16 in this phone.

17 He went to Android. And then Google bought Android. So
18 all of that knowledge came, and all of that knowledge about the
19 importance of those packages.

20 He also knew something else. And you'll see here
21 something called java.lang .api.

22 Java.lang is one of the APIs. And they knew that they
23 were copyrighted because the copyright that I've talked about
24 is on file for the world to see. And they knew that they were
25 copyrighted.

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1 They also knew that using these packages would save them
2 in, their words, a pretty crazy amount of time. Remember I
3 mentioned shortcut. Internally their documents say that using
4 Java would save them a pretty crazy amount of time. And the
5 top there says "Reasons to shift to primarily a Java API."
6 Those are the packages.

7 Everybody else took a license. Google wasn't alone in
8 recognizing that a license was critical. Everybody else took
9 one. Companies like RIM, BlackBerry, Motorola, Nokia. While
10 everybody else took a license, Google took a shortcut.

11 And remember what I told you earlier, that Google broke a
12 basic rule. You don't take people's property without
13 permission. They have now been caught. And when you get
14 caught, you make excuses.

15 So let me tell you about excuse 1. Open source means we
16 can take your property and use it without your permission and
17 have \$42 billion in revenue because it's free. That will be
18 excuse 1.

19 Sun and Oracle have licenses. And those licenses have
20 rules. The open source license that you will hear about here,
21 sometimes called OpenJDK, but open source, requires that if you
22 take somebody's computer code and you change it -- like,
23 somebody who would make a phone would want to have their phone
24 be different than somebody else's, and they would make changes
25 to the code, but they wouldn't want somebody else to know about

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1 that. Samsung, who takes code and puts it in their phone and
2 tweaks it to be different than another company, wants to keep
3 that information private. And there are rules with open source
4 licenses, and that happens to be one of them.

5 That was not acceptable to Google. And it wasn't
6 acceptable to its business partners. And how do we know that?
7 Because we've got inside of their files. And we saw what they
8 were saying at the time, before they thought the people like
9 you, ladies and gentlemen of a jury, would see what was going
10 on.

11 And this is their internal statements about that open
12 source license, the OpenJDK. This is what they said at the
13 time, before anyone thought they would be seen:

14 "Using OpenJDK in Android was a verboten topic."
15 Verboten, forbidden.

16 "The lawyer-advised consensus is that there is potential
17 for trouble." Let's stay away from that open source license
18 because there's trouble.

19 And "It's incompatible with Android's needs." Doesn't
20 work.

21 That's what the evidence will be when you hear this
22 argument that everything is free to take. Woulda, coulda,
23 shoulda.

24 So they had two options: "Abandon our work and go one
25 route," fork in the road, "or do Java anyway and defend our

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1 decision, perhaps making enemies along the way."

2 Their words; not mine.

3 Ladies and gentlemen, they decided to make enemies along
4 the way, and they knew that they would if they did what they
5 did.

6 They also had another problem. It wasn't just that Java
7 was so great. As they put it in their own documents, their own
8 APIs were half-ass. And, ladies and gentlemen, these are their
9 words; not mine.

10 So they decided that going ahead with Java and the
11 packages was a final decision, even though they didn't have a
12 license to do it.

13 As time rolled forward, the clock was ticking. The
14 pressure got higher. Another internal memo. "We are beyond out
15 of time." That's right coming up to the time that they
16 actually took those packages. They were "beyond out of time."

17 Another excuse that you will hear, excuse 2 of the fair
18 use excuse: Apache Harmony.

19 They will say a company out there, not for profit, called
20 Apache Foundation, used some of this code in something called
21 Apache Harmony. And they will say, just like a child says,
22 They did it, so I can do it too.

23 That's an excuse.

24 Apache, you will learn from the evidence, was not licensed
25 and never had the right to give Google anything. And worse

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1 than that, Google knew it. Google knew that Apache didn't have
2 a license to give them anything.

3 Apache Harmony ended up being put on the shelf pretty
4 quickly. That will be excuse 2 that you'll hear from Google.

5 So they move forward. The decision is final. And they're
6 out there trying to rouse up business partners and get them
7 signed up to get to the market. And these are some of the
8 companies that they send information to. And they went out and
9 met with.

10 And what do you think, in all these presentations, that
11 they told them about? What was front and center to try to sign
12 them up? From their own internal documents: Do business with
13 us because we've got Java.

14 And you see in these documents, it's not just plain Java.
15 Java.class, the libraries. 6 million developers. We've got
16 those developers too. Java APIs. Java class libraries.

17 The class libraries, you will learn, are part of the APIs.
18 That's where they are in the libraries. And this is what they
19 were telling their business partners in private presentations.

20 You'll see over here core Java libraries. And you'll see
21 this presentation. This is what they were handing out. But
22 when it came to talking in public, private presentation to
23 AT&T, the core Java libraries.

24 But then they went out in public. Same thing. No mention
25 of Java.

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1 Java Conference comes up 2008. They're almost ready to
2 bring their phone out. One of their engineers is getting ready
3 for the conference and asks Mr. Rubin, What can I tell people
4 about what we've got?

5 Talk to people only one-on-one. And please don't
6 demonstrate to any Sun employees or lawyers.

7 Don't let them see what we are doing. Don't let the
8 lawyers know.

9 Ladies and gentlemen, evidence like that shows that
10 someone knew what they were doing was wrong.

11 Documents from their internal files: "Scrub out a few
12 more Js." Scrub the J word out. "The J word" is Java. "Bad
13 words" in their documents.

14 This lawsuit was filed August 2010. Six weeks later,
15 someone is looking at their code and saying, Let's make sure
16 there aren't bad words in there. The bad words are "Java."
17 And the bad words are "license." The license they never took.

18 Well, they took the design, these packages, and they put
19 them right into the Android operating system. And that's what
20 the evidence will show.

21 And this is interesting. This is an HTC Touch Pro phone
22 that had a Microsoft operating system in it and had Java and
23 certain of these packages in it. This was licensed by Sun in
24 2008. This was the first Android phone. Same year. Has the
25 Java API packages in it. Copying is what the evidence will

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1 show.

2 And one of the questions you will hear about is the word
3 "transformation." I mentioned that before.

4 So we asked one of the Google witnesses:

5 These packages, do they do the same thing in Android
6 that they do in Java?

7 "They serve the same purpose." That was the
8 testimony.

9 And I thought it would be useful to give an example of
10 what transformative might be. Because when do you something
11 and you copy it, and you use it for the same purpose so that it
12 is a substitute -- here are the two phones, so that if you're
13 trying to buy one, you're going to choose between the two, and
14 one would be in place of the other.

15 But I thought it would be useful to show an example of
16 using Java in a way that could be transformative. Piece of
17 artwork. It's got some Java code on it. And an artist took it
18 and put it on a piece of artwork.

19 This is a different purpose than taking code where it's
20 used in a mobile smartphone and then using it in another mobile
21 smartphone. So when you think of this idea of transformative,
22 I thought this might be a useful example.

23 Well, we roll forward. Phones were on the market.
24 Executives were having discussions. And Google was concerned.

25 They were concerned sufficiently about being sued that

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1 they thought about buying all of the rights to Java. Because
2 you may hear in this case, another excuse: We thought
3 everything was okay. We thought taking your property without
4 permission was okay.

5 You may hear that excuse. But the evidence will be that
6 they were worried. They were worrying about being sued.

7 And from their internal files, right around the time that
8 this lawsuit got filed, it's almost incredible to see and
9 believe this: They thought, at this time, that they could be
10 out of business in ten years if they missed the mobile window.
11 This from the president of their mobile platform group.

12 Henrique de Castro wrote this memo that we got out of their
13 files.

14 2010, imagine Google being out of business. 2010 they
15 wrote this. And they don't say in that document, by the way,
16 "maybe." They say, "We'll be out of business."

17 So the memo that I started with, they went back and
18 looked. Oracle was on the scene. Oracle had bought Sun and
19 was concerned about what it was seeing. Google was too. And
20 they knew that the alternatives, in their words, all "suck,"
21 and they needed a license.

22 So what might you hear? An excuse. They're going to talk
23 to you about a blog. Yes, ladies and gentlemen, a blog that
24 was written by the former CEO of Sun, named Mr. Schwartz. He
25 wrote a blog when Android came out, congratulating them.

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1 And you will hear from Google the excuse: We thought it
2 was okay. Everything is fine. The CEO sent out a blog saying
3 nice things.

4 What will the evidence show? The blog was a public
5 relations step to try to keep friendly, to try to work a deal
6 and not poke somebody in the eye.

7 But when you see internally what was going on, you will
8 see that Sun was trying to make the best out of a really bad
9 situation.

10 Google was very, very popular and getting bigger.

11 Sun was struggling a little bit. They had some tough
12 times in their business. Fortunately, Oracle came along,
13 bought them and saved a lot of jobs. But at this time Sun was
14 trying to make the best of a bad situation.

15 And you'll see the story and you'll hear the evidence that
16 Sun was not happy with what Google was doing. But they had a
17 full plate that they were dealing with, with some of their
18 issues. So when you hear the excuse that, oh, we always
19 thought it was okay, wait to hear the evidence.

20 So now we're into the third phase of the chapter, the
21 consequences and harm.

22 Sun was on the market at that time with all of these
23 phones. The smartest phones that there were. BlackBerry,
24 Nokia at that time. The smartest phones on the market. Sun
25 was in those phones.

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1 Then the HTC phone comes out on the timeline, the one I
2 showed here.

3 So what happens? Oracle completes its purchase of Sun,
4 and it's seeing evidence of harm.

5 And I stop here for a moment because the judge will read
6 you an instruction when the openings are done. And he will
7 tell you in this case that there need not even be evidence of
8 actual harm under fair use. If there's just a potential harm,
9 then that is a problem for Google.

10 The evidence will be here that there's evidence of actual
11 harm.

12 Deteriorating profitability in key OEMs. OEM, original
13 equipment manufacturer, the folks who make the phones.

14 Oracle was seeing money go out the door. And the door was
15 going into the Google door.

16 Android impact is revenue decline. Direct evidence of
17 actual harm. Severely damaged handset sales. That will be the
18 evidence.

19 You will also see evidence of things like Kindle, where
20 Oracle had a commercial license for Kindle, and now the Kindle
21 Fire came out and it's using Android instead. And the Android
22 in there has our client's property in it. Oracle's Java.
23 They're competing against themselves.

24 And even worse than that, Google was giving away Oracle's
25 property for free. Although, they were making \$42 billion in

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1 revenue.

2 Other markets in this case. The judge will say in his
3 instructions what would happen if there was unrestricted and
4 widespread use of the copyrighted materials.

5 In other words, what if everybody did this? What if this
6 went beyond phones? What if it went into other products?

7 And you will see all of these products, the evidence will
8 show, that Java is used in. All of these other products. And
9 you will hear evidence of the potential harm if this goes even
10 beyond where it is now.

11 Inside of Google they were doing well. Oracle was getting
12 harmed. Their Android revenues are huge. According to their
13 CEO.

14 (Video played.)

15 This is their CEO. "Hugely profitable" to Google. Here
16 it is, \$42 billion. Oracle is saying, in their words, "severe
17 damage."

18 Google, \$42 billion in revenue. Profits, ladies and
19 gentlemen, on that, about \$21 billion

20 **THE COURT:** You're down to about three minutes.

21 **MR. BICKS:** Thank you, Your Honor.

22 And so what -- if we look at the timeline and we look at
23 the graph, this is what was happening to Java and its sales.
24 And this is what was happening to Android. One going down, one
25 going up. That will be the evidence on the harm.

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1 And even worse than that, ladies and gentlemen, Google
2 kept coming out with new what they call flavors. New versions
3 of Android, each time using these APIs, even though they knew
4 that they shouldn't be doing that. Gingerbread, Honeycomb, Ice
5 Cream Sandwich, Jelly Bean. They kept going even though they
6 knew that it was not the right thing to do.

7 So let's come back to the factors that the judge will tell
8 you about, because I want to go one by one and tell you what
9 the evidence will show.

10 Was this for commercial reasons or for not for profit?

11 It was for commercial reasons, the evidence will show. It
12 was hugely profitable.

13 Was it transformative? No. The Java API packages do the
14 same thing in Android, as I showed you in those phones, as they
15 do in Java.

16 Did they act in good faith? The evidence will show that
17 they did not.

18 Are these packages, the design, creative? And how
19 creative? The evidence from both sides will show that they are
20 highly creative to put those packages together.

21 Are they important? Google took the heart out of Java and
22 put it in those 3 billion devices.

23 And is there actual or potential harm? Google's copying
24 caused severe harm to Oracle and potential harm.

25 So this is what the evidence will show from their

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1 documents. Not my words; their words.

2 (Presentation displayed.)

3 **MR. BICKS:** It's time for me to sit down. That is my
4 opening statement. And before I do, I'd like to say one other
5 thing. Google goes first. We go second.

6 Please wait until you hear all of the evidence because
7 they've got the burden of proof. And we'll sit and wait to put
8 our case on.

9 So on behalf of Annette, and Lisa, Gabe, Georges, Matt,
10 and Trudy, and the rest of the folks from Oracle, we look
11 forward to presenting the case.

12 And I really appreciate your time this morning. So thank
13 you very much.

14 **THE COURT:** All right. Thank you, Mr. Bicks.

15 We're going to take a short break. Because we'll be going
16 another hour, I think I should give you a break over there.

17 But before we do that, do you see the timeline over here
18 on the poster board?

19 The lawyers have done a good thing and agreed to this
20 timeline. So this will be evidence that you may consider. And
21 we want to keep it in the courtroom so that as witnesses
22 testify to various meetings and emails, and the like, you can
23 at a glance look over here and see where it fits in the overall
24 timeline.

25 I'm going to try to get handouts on a small sheet of paper

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1 to give you.

2 Do you have those ready?

3 **MR. BICKS:** Yes, we do.

4 **THE COURT:** I tell you what. When you come back,
5 these will be sitting on your chairs. And you can stick them
6 in the back of your steno pad and consult them as you wish.

7 It will be your personal copy to keep. You don't have to
8 write anything on it. You can write everything on it. It's up
9 to you.

10 But it's something to help you with the keeping straight
11 the dates. It won't have every date. It just has some of the
12 key dates.

13 All right. Remember the admonition you're not supposed to
14 talk about the case. I order you, you're not supposed to talk
15 about the case.

16 We'll see you back here in 15 minutes. Thank you.

17 **THE CLERK:** All rise.

18 (Jury out at 9:11 a.m.)

19 **THE COURT:** Okay. Be seated. Thank you.

20 Could you give Dawn those handouts, and then she will put
21 them on the chairs.

22 These have been stipulated too; right?

23 **MR. BICKS:** Yes.

24 **THE COURT:** I'm going to step off the bench unless the
25 lawyers need me for something.

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1 **MR. VAN NEST:** No, Your Honor.

2 **THE COURT:** You can rearrange the courtroom any way
3 you want.

4 **MR. VAN NEST:** We will do it.

5 **THE COURT:** Thank you. See you in a minute.

6 (Recess taken from 9:12.m. to 9:25 a.m.)

7 **THE COURT:** All right. I don't know where my clerk
8 is.

9 **THE CLERK:** Right here.

10 **THE COURT:** Here she is. Are we ready to bring in the
11 jury?

12 **THE CLERK:** Yes.

13 **THE COURT:** Everyone please be seated.

14 Counsel, what I would like to do is, after your next
15 opening, I will read the preinstruction on fair use. And then
16 we'll start with the evidence.

17 And then when the first expert witness is about to appear,
18 that's the point I would like to read the instruction on expert
19 witnesses. And then I will repeat it when the first Oracle
20 expert witness is about to appear.

21 Is that satisfactory to both sides?

22 **MR. VAN NEST:** That sounds great, Your Honor.

23 **MR. BICKS:** Yes.

24 **THE COURT:** Okay. Good. I don't think we're going to
25 have any retained experts anyway, are we, today?

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1 **MR. VAN NEST:** No.

2 **THE COURT:** Okay. Ready?

3 **THE CLERK:** Yes.

4 **THE COURT:** We're ready.

5 (Jury enters at 9:26 a.m.)

6 **THE COURT:** Welcome back. Please be seated.

7 All of you should have the timeline.

8 And when you're all settled in, we will go to the next
9 item of business.

10 Are you ready over there in the jury box?

11 Okay. Now Mr. Van Nest will make the opening statement on
12 behalf of Google.

13 **OPENING STATEMENT**

14 **MR. VAN NEST:** Thank you, Your Honor.

15 And good morning, everybody.

16 As you know, we met yesterday. My name is Bob Van Nest.
17 And I'm really proud to be here on behalf of Google, one of the
18 most innovative technology companies to come along down the
19 road in many, many years.

20 First thing I want to do is say thank you for your service
21 as jurors. You've heard many times this is an important case.
22 And it really is for Google. And so we appreciate your taking
23 time out to help us and all the attention that we know you'll
24 give the case.

25 The really phenomenal success of Google's Android platform

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1 was due to the hard work of Google engineers and Google's
2 decision right at the beginning to build Android with free and
3 open technology and make it available for everyone else to use.

4 Google engineers spent several years and hundreds of
5 millions of dollars to build the Android platform using Google
6 technology and know-how. And what they created is something
7 that had not existed before. Not in Java and not in anything
8 else. They created a brand-new platform for innovation in
9 smartphones and tablets that was beyond anything that any of us
10 had ever seen before.

11 And then Google made the decision to make that platform --
12 which they spent the time and money to build -- open source so
13 that manufacturers could use it without any payment to Google,
14 to build smartphones and tablets.

15 And that's why we have so much choice now in Android
16 phones. We can get phones from Samsung, LG, Motorola, Sprint,
17 Verizon, and many, many others. Dozens of others. That's why
18 Android has become the number-one selling smartphone in the
19 world by a long, long measure.

20 Now, parts of Android were built using the Java
21 programming language. But the Java programming language is
22 open and free for anyone to use. That's an established fact in
23 our case.

24 Judge Alsup will read established facts later on. But
25 it's an established fact that the language was free to use.

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1 There's no claim in this case that Android's use of the
2 language is wrong in any way.

3 Sun created the Java programming language back in the
4 '90s. And Sun gave Java away to the world. Sun taught Java in
5 universities, in high schools. They put it in textbooks. They
6 put it in conferences.

7 The whole idea of Java, for Sun, was to create as many
8 people as possible writing in Java, a big pool of customers for
9 Sun.

10 And these Java APIs, that you heard so much about the
11 application programming interfaces, they were promoted by Sun
12 along with the language. They were open and free, given away
13 with the language, to use with the language.

14 Why was that? Well, when programmers write in the Java
15 Language, they use these API labels as a kind of a shorthand to
16 refer to the common methods that any computer program does.
17 Methods like sort, add, print. Common building blocks of any
18 computer system. They use these building blocks, these simple
19 APIs, to call on these methods for performing things as part of
20 a program.

21 Sun's whole business plan was to make the language and the
22 APIs as popular as possible so that there would be a big base
23 of users familiar with Java and the APIs that Sun could sell
24 Java-based products and services to. That was their whole
25 business plan.

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1 Now, what did Google do? Google used just the labels for
2 these APIs; not the packages. They used the labels. They put
3 their own source-implementing code in the labels. They
4 integrated these 37 Java API packages into 131 additional
5 Android packages.

6 They built this up with a lot of additional technology to
7 create the Android platform, which is the software that can run
8 your whole smartphone inside. We say full stack. It runs the
9 whole thing.

10 As a result of all of that technology, these APIs that
11 they're complaining about, they represent less than 1 half --
12 excuse me. Less than one-tenth of 1 percent of what's in
13 Android.

14 There are 15 million lines of code in Android. They're
15 talking about 11,000 labels. And we'll talk about what those
16 labels in a minute. It's less than one-tenth of 1 percent of
17 all the code.

18 Now, when Android came out, it was phenomenal. It was
19 remarkable. And even Sun was aware that Android had changed
20 everything.

21 In 2007, when Android was announced -- and it was
22 announced publicly; and the APIs and everything else were put
23 on a website so that anybody in the world could see that
24 Android was using the Java Language and all these APIs -- Sun
25 didn't complain.

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1 Sun, which had created the language, they didn't object.
2 Instead, their chief executive officer posted on an official
3 Sun website, an official Sun website:

4 "Congratulations Google."

5 "Welcome, Android, to the Java community."

6 "Sun supports your effort."

7 "Android has strapped a rocket onto Java."

8 This was a public acknowledgment on a Sun website,
9 welcoming not only Android, but Android's use of Java.

10 There were no secrets here. Android was published open
11 source. Not only that, but in the years that followed, both
12 Sun and, to some extent, Oracle continued to praise Android and
13 offer further support.

14 I'll show you the emails a little bit later on.

15 Mr. Schwartz privately acknowledged the importance of
16 Android and even developed his own products. Sun developed
17 their own products to work on top of Android.

18 So this claim that you heard in Oracle's opening statement
19 that Android is wrong or it's an infringement or it's unfair,
20 that claim wasn't made until years later, after Oracle
21 purchased Sun and tried to change the rules around Java.

22 Mr. Ellison, who was the chief executive officer of Oracle
23 at the time, he tried to use Java to build their own
24 smartphone. They wanted to be in the smartphone market too.
25 They weren't in it. They were in the feature phone market,

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1 which is a very different thing. Flip phones. They weren't
2 able to do it. Unsuccessful.

3 They then tried to partner with Google. We want to be
4 part of Android. We would like you to use some of our
5 technology with Android. Unsuccessful. Too late. 2010.

6 Then and only then did Oracle claim that there was
7 something wrong with Android. And so now, after taking no risk
8 at all, and making no investment whatsoever, they want all the
9 credit for Android's success, and, apparently, billions of
10 dollars in damages.

11 But the evidence isn't going to support that. And I want
12 to talk about the four key points of evidence that I'll be
13 reviewing this morning and that we expect to present when our
14 case begins.

15 First of all, Android is successful because of the hard
16 work and innovation of Google and its partners. It's Google
17 technology that makes Android what it is.

18 Secondly, Sun openly applauded Android's use of the Java
19 Language and APIs. They welcomed Android to the Java
20 community.

21 Sun's use of the Java APIs is transformative. As I'll
22 show you in a minute, Android is a brand-new use for these Java
23 APIs, one that had never existed before. And that's part of
24 the definition of transformation and fair use.

25 And, finally, Sun and Oracle's mobile strategy to get into

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1 the mobile market was a failure on its own. Android didn't
2 cause it. And you're going to hear testimony from Sun
3 executives to back that up. They failed to innovate.

4 Android is not a replacement for any version of the Java
5 platform. It's not a replacement. It's its entire brand-new
6 category, different from anything that Sun ever had or intended
7 to be used.

8 So you know that this trial is about fair use. And you're
9 going to receive some instruction from Judge Alsup when I
10 finish. But, basically, the right of fair use -- this is part
11 of the instruction you'll receive -- permits the use of
12 copyrighted work by others without the copyright owner's
13 consent in limited circumstances. The idea is to encourage the
14 development of new ideas that build on old ones.

15 So if a use is a fair use, if you find that it's a fair
16 use, then there is no copyright infringement because the law is
17 there both to protect the copyright owner and to encourage fair
18 use in transformation.

19 This is another of the instructions that you'll receive
20 shortly, because transformative use is the hallmark of fair
21 use. A knockoff, a bootleg CD, that's not fair use. Something
22 you simply copy and resell, not a fair use.

23 What fair use requires is something transformative. A use
24 is transformative if it adds something new, with a further
25 purpose or different character, altering the first with new

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1 expression, meaning, or message.

2 Commercial uses qualify as fair use if it's
3 transformative. It's not the law that if you use something
4 commercially that's not a fair use. Commercial uses are fair
5 uses, too, if they're transformative.

6 And Android is exactly the kind of transformative use that
7 fair use was intended to protect and encourage. Why?

8 Google engineers used a very tiny portion of Java SE.
9 They used less than one half of 1 percent of all the code in
10 Java, and they created something brand-new and different. A
11 new platform for innovation in smartphones and tablets.
12 Something Sun was never able to do. Something Oracle has never
13 been able to do.

14 They took a tiny part of a great big copyrighted work,
15 found exactly the right ingredients, added their own work to
16 it, changed it, supplemented it, made it big, added open source
17 technology. And now there's something that has never existed
18 before, ever.

19 So what do I mean?

20 You heard a lot about Java. But we're talking about some
21 specific platforms of Java.

22 Java SE 5 is the copyrighted work. I'm showing that on
23 the left. Java SE 5 was created for servers and desktops.
24 Rather large. That's what Java SE 5 was created for. Never
25 for smartphones.

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1 Java ME, that's what Sun had in feature phones. It's
2 really small. It's called Micro Edition. 10 APIs. It's not
3 capable of supporting a smartphone. Not even capable.

4 So what do we have? We have Java SE on the left. We have
5 Java Micro on the right. And Android is an entire new
6 platform. Something that Java SE can't do. Something Java ME
7 can't do. It's transformative in that it took a tiny part of
8 Java SE 5, used it in a new and different way to create
9 something that had not existed before.

10 Now, how did this happen? It happened through a lot of
11 hard work and innovation.

12 Let me pause for a minute because we're talking about
13 Google.

14 You met a lot of people yesterday. I want to introduce,
15 again, our representative from Google, Catherine Lacavera, who
16 is going to be with us throughout the trial.

17 **MS. LACAVERA:** Good morning.

18 **MR. VAN NEST:** So, as we know, Google is a highly
19 innovative company. Invests a lot in R&D. Big investment.
20 Four out of ten Google engineers work in research to build new
21 products.

22 And we're all pretty familiar with what they've done
23 product-wise. We've got Google Search; Google Mail. We heard
24 a lot of discussion about jurors yesterday.

25 The whole idea is to make brand-new things that didn't

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1 exist before; change the status quo; give the products away to
2 consumers for free and charge for the ads.

3 Yes, we have ads when we use these products. That's how
4 Google makes money. No big secret about that. The consumers
5 get the products. Then there's ads on top of the products.
6 Google charges for the ads.

7 This was the status quo in 2005. That's when our story
8 really starts. The status quo was flip phones, small phones,
9 feature phones. Nice phones for making calls. You can text on
10 these.

11 But, boy, they're nothing like today's smartphone; right?
12 They don't have the applications. They don't have video. They
13 don't have streaming. They don't have GPS. They don't have
14 WiFi. They don't have all those things that we've all come to
15 expect in a modern smartphone.

16 Google wanted to change the status quo. They felt they
17 could do better, they could come up with something much better.

18 Took about three years, 85 to 90 Google engineers,
19 hundreds of millions of dollars to build Android, just to get
20 to the very first step of making the platform available.

21 Now, Google also went out and did something else. They
22 recruited a whole group of open source people, major companies:
23 Sprint; Samsung; eBay, HTC; Motorola. Some of the leading tech
24 companies became part of the Open Handset Alliance.

25 The idea was everybody contributes, and we make the

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1 platform available for development in smartphones and tablets.
2 So everybody can use it; so there would be a lot of consumer
3 choice; so nobody is going to control it. It's going to be out
4 there for folks to use.

5 You're going to hear from decision makers and the builders
6 at Google who did this.

7 Eric Schmidt will be our first witness this morning. He's
8 here in the building, waiting to testify. He's our chief --
9 was Google's chief executive officer then. He was a big
10 proponent of Android. And he's a special witness because he
11 started at Sun. He was involved in the launch of Java way back
12 when.

13 And Andy Rubin is the father of Android, if you will.
14 Mr. Rubin developed the idea. And he built Android with other
15 engineers at Google.

16 So what is Android? What's the Android platform? You're
17 going to be hearing a lot about Android, and I want to talk
18 about the platform and how these APIs fit in.

19 This is a picture that Google uses to display the
20 platform. And it's representing software. It's the software
21 system inside your phone, that runs it. And I want to run
22 through what's there, top to bottom.

23 There are applications that we are all familiar with.
24 Your phone, itself, is an application. Google Maps is another
25 application. You want to browse, that's an application. A lot

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1 of the applications come installed on the phone. Others you
2 can download.

3 In the beginning the applications on Android were written
4 primarily by Google engineers. And over time other application
5 developers joined in too.

6 To run those, you need an application framework to do
7 simple things. What's on your screen? How are you going to
8 change from one screen to another? You get a notification, you
9 have a phone call. There's a lot of code there, all written by
10 Google engineers in the application platform.

11 Next one. Libraries. Now, the libraries, some were built
12 by Google -- these are not the Java libraries. We haven't
13 talked about any Java APIs yet. We'll get there.

14 But these libraries are from open source or written by
15 Google. What do they do? They provide some of the key things
16 you want and use in your smartphone.

17 So, for example, one of the open source libraries is Open
18 GL, Open Graphics Library. You want to play games, Candy Crush
19 Angry Birds, all those 3D graphics, they come from an open
20 source place. And the Google engineers integrated them into
21 Android.

22 You want to surf the Web. WebKit is something that Apple
23 created. Apple created WebKit and made it open source.

24 By "open source," what do we mean? We're using that term
25 a lot. But open source generally means companies or

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1 individuals contribute code to a common thing that's made
2 available for everybody to use for free. You're not charged
3 for it.

4 There's licensing restrictions sometimes. But, generally
5 speaking, open source is made by a variety of people, made open
6 source. Folks can share it for free. That's open source. And
7 it's a big thing in commercial products today, too, not just --
8 not just hobbies.

9 So Apple made WebKit available. Google used it. Google
10 had to build -- if you're going to listen to Spotify, Pandora,
11 you want to run video, go on YouTube, and all that, which you
12 can do on your smartphone, you need an audio and video system.
13 Google built that. They built the open media framework that
14 runs all the video top to bottom.

15 Now, in addition to that, you need something to
16 communicate with the hardware. Because this is just the
17 software. This isn't -- this isn't the hardware. That's made
18 by the OEMs, Samsung, Motorola, whatever phone brands you have.
19 We're talking about the software, now, inside.

20 But software has to communicate with the hardware. Google
21 used a very famous open source project, created in Berkeley,
22 the Linux kernel. The Linux kernel is an operating system that
23 sits on the bottom of this platform and communicates with the
24 hardware.

25 You want to use your phone, want to use your camera, want

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1 to use your WiFi, want to use your GPS, those are all physical
2 things in the hardware that Linux communicates with.

3 Still not to any Java APIs yet. This is all separate from
4 that.

5 In Android runtime, there's something called the Dalvik
6 virtual machine. You're going to meet the engineer who built
7 and designed the Dalvik later this week.

8 Dalvik is important because it translates the computer
9 code that programmers write into machine code that the hardware
10 can understand. So Dalvik is a critical part of Android. And
11 the Google engineers spent quite a bit of time building that.

12 Now, on top of that are the core libraries. The core
13 libraries are 168 libraries in Android. 131 of those are not
14 even in dispute at all here; right. Those are Android packages
15 designed by Google engineers. In some cases they used open
16 source technology. But those 131, not an issue. What's an
17 issue are the 37 Java API packages, which I'm showing next.

18 Now, in these Java packages the Google engineers
19 understood that they couldn't use source code created by Sun.
20 That was proprietary.

21 The implementing code, the implementing code in the
22 packages is original Google. And Judge Alsup will tell you
23 that a little bit later on.

24 The labels I mentioned, the labels for these packages,
25 Google engineers understood those were open and free to use.

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1 And it was well-known to Mr. Schwartz that Google was using
2 those labels when he said, "Welcome to the Java community."

3 So I'm showing these as squares with nothing in them
4 because it's only the labels that are accused of anything here,
5 not the code.

6 And the Google engineers built the code themselves, or
7 used open source sources for it. And so all we're talking
8 about now are the labels, which are a very, very small part of
9 Android; right.

10 There are 15 million lines of code. So my next slide. If
11 this -- if this disk represents all of Android, the 15 million
12 lines of code, here's where those 11,000 lines of labels come
13 in. Less than one-tenth of one 1 percent. Less than one-tenth
14 of 1 percent.

15 And if you compare that to the Java SE 5, those labels
16 only represent only less than one half of 1 percent. It's not
17 as though this is about all of Java SE. No, there's a lot of
18 implementing code in Java SE that wasn't used at all in
19 Android. And there's no claim to the contrary.

20 So this is what I mean by transformation; right? This
21 didn't exist before. No one had been able to do this,
22 especially using Java.

23 And then they went ahead and gave it away. The Android
24 platform is free for any manufacturer to use to build a
25 smartphone or tablet. And, look, they all have.

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1 I've only got a few up here but, as we all know, there are
2 tablets and smartphones from lots of manufacturers.

3 Okay. Sun and Oracle openly applauded Android's use of
4 Java. This was no secret. Mr. Schwartz wasn't in the dark.
5 And for years they -- they were working to get with Google on
6 Android; right.

7 No one was claiming any copyright infringement back in the
8 day. That's a new invention of Oracle starting in 2010.

9 So why would it be, why would it be that Sun would welcome
10 us? Well, let's take a look at what these APIs actually are
11 all about.

12 Here is Mr. Ellison. He understands nobody owns the Java
13 programming language. We took his deposition under oath.

14 Anybody can use that without any royalty at all?

15 Correct.

16 This next witness is a witness that worked at Sun and is
17 now at Oracle. And he's saying, hey, the APIs are a critical
18 part of the Java Language. We asked him:

19 Do you understand the Java Language to include the APIs?

20 Yes. I mean, the APIs are a critical part of the Java
21 Language.

22 Would you say that's true for the APIs in this case? In
23 this case.

24 Those APIs are a fundamental part of what makes Java Java.
25 What a developer recognizes as Java.

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1 And let's remember, the Java programming language is free.
2 Sun promoted the APIs for use with the language. And it was
3 understood by engineers at Google that using the labels was
4 fine and fair.

5 And here's Mr. Schwartz. He will be a witness here this
6 week as well. We're calling him. He used to run Sun back in
7 the day, back during this announcement, okay.

8 Were the APIs marketed along with the language? In other
9 words, free and available for everyone?

10 Yes, absolutely.

11 We talked about open APIs, and you compete on
12 implementations.

13 You can use the labels, but the content of the package you
14 have to design yourself. The implementing code.

15 Those packages you saw in the Oracle opening, Google
16 didn't use the packages. Google used only the labels. That's
17 it.

18 Now, why is that significant? Bear with me, but I want to
19 talk a little bit about what an API is and how it works so you
20 can understand the significance when you hear people throwing
21 the term around.

22 There are generally two elements of an API, two parts.
23 One is the declaration, the labeling. In this case, our
24 example is public static float max.

25 What's max? Max is just a simple computer function to

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1 compare two numbers and see which one is the maximum; right.

2 You are going to sort by number. Which number is the maximum.

3 That's why it's called max.

4 So there are two parts to our max API. There's the label
5 that the programmer uses to call upon the method. And then
6 there's the implementing code that's ingrained. The
7 implementing code does the work. It actually makes the
8 comparison.

9 So the implementing code actually performs the task that
10 the programmer wants. The label simply says go ahead and do
11 the work.

12 So let's see how this would work. Let's assume that
13 you've got a programmer and he wants to write a program that we
14 could all download on our devices to compare prices at Amazon;
15 right. Maybe he works for Amazon. He's going to create an
16 application.

17 He knows he needs to compare prices, so he puts his max.
18 He's going to sort high to low. So part of his program tells
19 the computer, okay, max, compare these two prices: 51.99, 64.
20 Compare those.

21 Well, he writes "max"; the program inputs the numbers; and
22 the implementing code, itself, does the work. Not the
23 declaration. The code does the work. And the code produces
24 the result. The code does the comparison, produces the result.

25 And there's the result. \$64 is more expensive than the

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1 other one. And that's part of his program. He's used the
2 label to call on the implementing code.

3 Now, why is it important? I want to draw a distinction
4 between the labels and the implementing codes in programs like
5 these.

6 So you heard about the structure and sequence, the design.
7 Well, the design is simply a combination of all of these
8 declaration labels together, okay. The structure, sequence and
9 organization. So in this example, if I'm writing in "max," max
10 is my method. My method is a math method. So it's in the math
11 class. And the math class is something called java.lang.
12 "Lang" stands for language.

13 So why do I have a file cabinet out here? It's to
14 emphasize that this SSO that they're complaining about being
15 used in Android is only a method of operation.

16 It may have been hard to develop, but it's a functional
17 thing. And that's important in fair use law.

18 So let's assume, now, that this cabinet is my Java
19 package. Java.lang is my package. It's the library. The
20 package will have a series of classes.

21 And the developers learn this when they learn Java. All
22 the developers learn these terms when they learn the Java
23 Language.

24 So in the java.lang package I've got a math class, a
25 number class, an object class, and a process class. The

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1 numbers are together; the objects are together. The
2 programmers know where to find them.

3 Now, if a programmer wants to use max, he or she knows, I
4 go to java.lang; I go to the max class; I pull it open. And
5 what do I have here? I have a whole bunch of math functions
6 because they're all together. And the math functions include
7 "max." Here's our max function just like on the screen.

8 What did the Google engineers believe they were free to
9 use? They thought and understood they were free to use the
10 label. Code that does the work inside, the implementing code,
11 all written original by Google engineers or used from open
12 source -- open sources that were free and available for use.

13 So of the thousands and thousands of lines of implementing
14 code in Android, there's no complaint here that any of that was
15 taken from Java. All the engineers at Google used were the
16 labels. They didn't use any of the implementing code. And
17 that helps you understand why Sun, at the time, felt this was
18 completely fair. This was completely fair to do.

19 Let's look at our next slide.

20 Oh, one more thing. If you compare the code in Java SE,
21 the implementing code which we have on the left -- let's show
22 it -- the labels in Android are the same, but the code is
23 different. That's what I just showed you in the cabinet. The
24 code is different. Google engineers wrote the implementing
25 code.

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1 Now let me show you one other example of how you might
2 think about an API.

3 We all know when we go into grocery stores they're
4 organized in a certain way. If you want sugar, you go to the
5 baking aisle. If you want produce, you go to the produce
6 aisle. If you want fruit and vegetables, you go there. You
7 want cereal, pancakes, you go to the breakfast aisle.

8 The APIs are organized in a very functional way. A lot
9 the same way. The developers learn these conventional names as
10 part of learning the language.

11 And so it's important for you to listen to the evidence.
12 We're not talking about all of Java. We're only talking about
13 the labels and declarations. We're not talking about all of
14 Android. All that platform is original Google and open source.
15 We're talking about a very small part both of Android and from
16 Java SE.

17 So how do the engineers go about doing this? What do they
18 look at?

19 There were a number of projects that were open source
20 projects that were using the Java declarations and writing
21 their own implementing code, which is what the engineers at
22 Android thought they wanted to do.

23 GNU Classpath is one. It was well-known to Sun that GNU
24 was using the declarations, and had written their own
25 implementing code.

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1 So in the very beginning of the development of Android,
2 the engineers at Android actually used GNU to see how well it
3 worked. They used the implementing code from GNU.

4 GNU had no license from Sun. And Sun was fully aware of
5 GNU. It's actually GNU. I'm using the initials, but GNU.
6 They were fully aware of it. And because GNU was not using the
7 implementation code from Java, it was fine. It was okay.

8 Google decided not to use GNU in Android. They didn't
9 think the implementing code that had been written by GNU was
10 good enough. So they looked at another project called Apache
11 Harmony.

12 Now, Apache is part of the Apache Software Foundation.
13 The Apache Software Foundation is a group of large companies.
14 Oracle is a member. IBM is a member. Intel is a member. They
15 all contribute code to various projects and make it available
16 as open source.

17 Apache has lots of different products, but the one we're
18 talking about in this case is Apache Harmony.

19 Harmony was a reimplementing of the same Java libraries
20 we're talking about. They took Java SE 5. They took the
21 labels and the declarations and built their own implementing
22 code.

23 Again, Sun was aware of Apache. Sun understood that
24 Apache was using the same labels and had written its own
25 implementing code.

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1 And so Google engineers believed and still believe today
2 that it was completely fair and appropriate to use the
3 declarations. And they took some, they used some, the open
4 source implementing code from Apache, in Android. This was --
5 this was well-known. All well-known.

6 So that's why it's not a surprise that in 2007 -- let's go
7 to our timeline -- Google started building Android in '05. And
8 they announced it in '07.

9 Can everybody see this from over there? Is it too far
10 away? Oh, you've got it in your hands. Thank you. Thank you.
11 That's a good thing.

12 So this announcement I'm talking about -- let's go to our
13 next slide -- was in November of 2007. Notice what
14 Mr. Schwartz says. This is on an official company blog in '07.

15 "I want to add my voice to the course of others at Sun in
16 offering my heartfelt congratulations to Google on the
17 announcement of their new Java Linux phone platform." Java
18 Linux phone platform.

19 Mr. Schwartz knew that Android as using Java the language
20 and the Java APIs. That was not a secret. And he says:
21 "We've obviously done a ton of work to support developers on
22 all of Java platforms." That's part of what my -- it's part of
23 what I said. They wanted Java out there. It was a good thing
24 for Sun to have lots of people adopting Java and using Java and
25 creating more people.

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1 It was a good thing for Sun that Android came along and
2 used the Android programming language. And that's what
3 Mr. Schwartz recognized.

4 "We've done a lot for everybody on these platforms, and
5 we're pleased to add Google's Android to the list."

6 "We're pleased to add Google's Android to the list."

7 Now, you heard Oracle's counsel talk about PR stuff. This
8 next line puts the lie to that.

9 Mr. Schwartz privately and publicly was talking with
10 Google about Android. This is an email that he sent to Eric
11 Schmidt, the same week as this announcement, saying, "Eric, let
12 us know how we can support your announcements next week."
13 There was going to be a further announcement of Android after
14 the first one. "We're happy to do so."

15 There's a bunch of these. There's a bunch of discussions.
16 There's communication directly between Mr. Schwartz, who ran
17 Sun, and Mr. Schmidt.

18 And at no time, at no time did Mr. Schwartz ever say this
19 is copyright infringement, or you can't use the APIs, or
20 that's -- that's unfair. Any of that.

21 It was always about, How can we work together? We want to
22 put a product of our own on top of Android's.

23 Now, then Mr. Ellison gets in the act. You can see on
24 your timeline, in October of '08, there's more handsets
25 released. And Mr. Schwartz is glad about that.

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1 And then in April of '09, Oracle agrees to acquire Sun.
2 Takes a while to make it happen, but they agree.

3 So Mr. Ellison, he comes to the JavaOne Conference in '09.
4 The JavaOne Conference is the conference of all the Java
5 developers. They're all there. Sun is there. GNU is usually
6 there. Apache is there. All these folks are there at JavaOne.

7 And Mr. Ellison shows up and he says on stage, "Sun has
8 done a fantastic job opening up Java, giving Java to the world,
9 and we are going to do more of the same." We, Oracle, are
10 going to do more of the same.

11 Not only that, he actually took the time to praise Android
12 specifically, and said he was excited and flattered by
13 Android's use of Java.

14 We've got a video from Mr. Ellison.

15 (Video played.)

16 **MR. VAN NEST:** "I'm flattered. I'm excited by
17 Android's use of Java."

18 That was in June of 2009.

19 Mr. Ellison later figured out that he couldn't use Java to
20 build a smartphone. He tried and failed. And that it was too
21 late to partner with Google. And that's when this claim first
22 arose. Right? After all this praise and his efforts to build
23 and his efforts to partner, that's when this lawsuit started.

24 So let me talk about what happened a little bit earlier in
25 time, because I want to make clear what happened during these

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1 discussions.

2 You saw a lot from Oracle about we need a license; got to
3 have a license; critical license. Okay. That all started back
4 in '05, and is completely out of context from what actually
5 happened. They want to revise history. Here's what happened:

6 At the beginning of Android, Google was hoping to work
7 with a lot of different companies to build Android. One of the
8 companies was Sun. They went to Sun. They spoke to Sun. What
9 they proposed to Sun was not, We need a license to the APIs.
10 No, no, no. It was a joint development project. A joint
11 development project between Sun and Google to build Android.

12 Why would that have been a good thing? Well, if they
13 could have used all the implementing code that Sun had already
14 written, and the virtual machine that Sun already had, and all
15 this technology, Google thought this would get us to market
16 faster.

17 Google is always trying to get to market quickly. They
18 said in '07, the window is closing. They said in '10, the
19 window is closing. At Google everything -- they want
20 everything to happen now, right, and get it out there for
21 consumers.

22 But the idea of this partnership was -- and you see it in
23 this slide here -- Sun and Google will jointly develop the
24 solution. Sun will give us the virtual machine, the class
25 libraries, the stack, and everything from Java.

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1 That's all proprietary stuff. The implementing code is
2 proprietary. You have to have a license to that. The virtual
3 machine, proprietary. You have to have a license for that.

4 Notice here, no mention of APIs or the Java programming
5 language, because those are free. Those are free. You don't
6 need a license to those.

7 The other thing Google thought would be great to get is
8 the brand. The brand. The Java brand was popular with the
9 telecom carriers, the wireless carriers. If you could actually
10 call your phone a Java phone, that would be good.

11 But these negotiations -- oh, and by the way, Sun doesn't
12 give the brand away for free. That you do have to pay for.
13 And you have to pay for the virtual machine and the
14 implementing code.

15 So at the time we're talking about now, back in '05 to
16 '06, Google knew it needed a license if it wanted all this
17 proprietary technology and the brand. They knew that. And
18 that's where these emails you saw come from. Yeah, we need a
19 license.

20 And Mr. Rubin was a big fan of using Java. And it turned
21 out the carriers didn't really care, because Google never got
22 the right to use the brand. And that's why it's called Android
23 and not Java phone. And Google never got the implementing code
24 or the virtual machine. That's why it took three years to
25 build.

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1 These talks broke down in '06. Google had been working
2 hard on its own. And it took another year and a half to get
3 this launched. Why? Because Google had to do it by itself.

4 It did the right thing. They used the labels that
5 everybody thought were open and free. And they built their own
6 implementing code, their own virtual machine.

7 All that stuff that's proprietary, Google had to build.
8 Now Oracle wants credit for all that, but it was built by
9 Google.

10 Negotiations broke down not over money. The negotiations
11 between Google and Sun broke down over, How are we going to
12 make this new joint-developed product open? How open is it
13 going to be?

14 Sun wanted to place controls and limits on it. Google
15 wanted it open for everybody to use. And it broke down.

16 And, as a result of that, Google didn't get any of the
17 advantages that it was looking for in this joint development
18 relationship. None of the code. None of the brand. None of
19 the virtual machine. None of that stuff. And that's why it
20 took another couple of years to get Android ready to go.

21 Here's another thing that was taken completely out of
22 context. I'm surprised they brought this up. There's no claim
23 in this case of any infringement of documentation.

24 And this is going to be explained by Mr. Bornstein. The
25 engineers were using the word "Java" in the code because it's

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1 Java code. And everybody knew that.

2 But there are comments that surround the code. And the
3 comments had the words "Java" and "license" in them. And
4 Google didn't have a license to call this Java.

5 So they went through and they took out the words "Java"
6 from the comments. But everybody in the world knew that the
7 labels and the declarations, the APIs, were Java, because
8 Google was running Java in Android.

9 So this is taken way out of context.

10 Okay. Point three. Google's use of the Java APIs is
11 transformative. And I want to come back to this because it's
12 one of the key factors in fair use analysis.

13 Is it a bootleg CD? Is it a fake Rolex? Those aren't
14 fair use; right? Those are just copies and knockoffs. That's
15 not what we're talking about.

16 If it's transformative, it can be a fair use. And, again,
17 this is what you'll hear from Judge Alsup in just a few
18 minutes.

19 If it adds something new with a further purpose or a
20 different character, even if it's commercial product, if it's
21 transformative, a transformative product can constitute fair
22 use. And, as I said, Android is just such a product.

23 I want to come back to this. I want to emphasize it.

24 Their copyrighted work, the one that you're being asked to
25 make decisions about, is Java SE, the Standard Edition. The

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1 Standard Edition is made for desktops and servers.

2 You didn't hear much about harm to the Standard Edition in
3 Oracle's opening statement because Android is not a substitute
4 for Java SE; right. Android is smartphones and tablets.

5 Now let's look at Java ME. That's what you heard them
6 talk about when they're talking about harm to their phones and
7 so on.

8 But Java ME has ten APIs. It was designed for use in
9 feature phones. It was designed for use in simple, small
10 devices. DVDs. Set-top boxes. You saw the list that they put
11 up. That's right.

12 The system of Java inside here isn't capable of running a
13 smartphone. And Oracle witnesses will concede that. It
14 doesn't have any of the characteristics that you need to run a
15 modern smartphone. And they know it too.

16 Why? Sun tried to use these same APIs to build their own
17 smartphone. These are two projects at Sun in July and October
18 of '09. They tried and failed to use the same APIs to build
19 something like Android. They failed. Couldn't get there.

20 Same thing for Oracle. Mr. Ellison asked for a study of
21 Java and, Can we build a smartphone? And they studied it and
22 they concluded, We can't do it. Very limited internal
23 expertise to make smart decisions.

24 With the thousands and thousands of engineers at Oracle --
25 you heard how inventive they are and how creative; and I'll

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1 give them credit for what they do -- they didn't have anybody
2 they thought could build a smartphone. Nobody.

3 And so they abandoned the smartphone market. They didn't
4 have anything -- they don't have anything that competes with
5 Android.

6 And on the flip side, Android doesn't compete with Java SE
7 or Java ME. It's a brand-new category. It's a platform for
8 innovation in smartphones and tablets that didn't exist before.
9 And I would say the great success of Android and the wide
10 adoption by others proves the point.

11 Products that are just a little better or a small
12 improvement or a copy, they don't take off like Android has.
13 You don't see manufacturers all over the world using that
14 platform if it's no darn good and it's just a copy.

15 Sun didn't have anything to offer. Oracle didn't have
16 anything to offer. Android is transformative, new and
17 different. And the evidence will prove that out.

18 Another factor in fair use that you heard about from
19 Oracle was harm. And our point on harm is, Android didn't harm
20 Java. Sun and Oracle harmed Java by failing to innovate and
21 failing to keep up with the modern needs of consumers that want
22 more features, functions, and uses.

23 Android is a new use for Java that Sun and Oracle weren't
24 able to accomplish.

25 Next slide please.

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1 So, again, these are two very different things. The
2 phones that you saw during Oracle's opening, they're nothing
3 like Java -- excuse me, like Android. They're feature phones.

4 And the phones that he showed you, that he claimed were
5 somehow Java in the smartphone, those were Windows Operating
6 System or the Danger Operating System. None of those are a
7 Java Operating System. Those phones use a little bit of Java
8 in them, but they are not Java smartphones.

9 Now, further evidence of this is found in the internal
10 files at Oracle and Sun.

11 Everybody gets discovery, and you get to look inside. And
12 I'm not going to make a big deal of that like they did. But
13 everybody exchanges their information. This is a slide we
14 found in Sun's files, making our point.

15 Feature phones are where Java is. I have drawn yellow
16 circles around these things. The yellow circles aren't in the
17 original, but everything else is original.

18 Look where Sun puts Java. They put it in the feature
19 phone category.

20 Where do they put Android? They put up there with
21 iPhone, where it should be.

22 More uses. More functions. More features. A whole
23 different market than feature phones. That's the market they
24 were in.

25 And Mr. Ellison, when we played a videotape from him, he

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1 concedes that too. He openly concedes that where Java was, was
2 not smartphones. It was feature phones. Otherwise, why would
3 they be trying to build something new?

4 Why was Java declining, and why wasn't it keeping up?
5 It's because the strategy of Sun and Oracle at Java was lousy,
6 as they concede. This is an internal memo from Terrence Barr
7 at Sun. He's a long-term Sun employee. This was said a week
8 after Android was announced. One week. "I'm keeping my
9 fingers crossed that Android gets to the powers that be at
10 Sun" -- as a wake-up call -- "that our mobile Java strategy is
11 failing."

12 Java was in trouble long before Android came along. And
13 Android isn't what caused harm to Java, as you'll hear from
14 Mr. Schwartz when he's here later this week.

15 Sun knew what the problem was. "Java is perceived as
16 stagnant and legacy." This is an internal document from Sun in
17 '09. "Stagnant and legacy." Nothing about Android here. This
18 is completely separate and apart from any criticism of Android.
19 "Stagnant and legacy."

20 Here's a chart -- this is a projection they made before
21 Android was even announced. In other words, you saw the chart
22 that Oracle's counsel put up showing feature phones. They knew
23 that was going to happen anyway.

24 This is a chart created at Sun in 2006, a full year before
25 Android was even out there. And look at the dropoff they're

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1 predicting. Why? Because Java was stagnant. Java was legacy.
2 And "Our mobile strategy is no good. We're nowhere."

3 And here's another thing. Here's another thing. You want
4 to talk about who did what to Java.

5 In 2007, Sun, itself, made all of Java SE free and open
6 source. Let me say that again. Sun, itself, made Java SE free
7 and open source in 2007.

8 What does that mean? Not the language, not the APIs.
9 They were always free. The implementing code, the virtual
10 machine, all of the proprietary technology they say was harmed
11 by Android, they made available for free under an open source
12 license in 2007.

13 So this same copyrighted work that they're claiming we owe
14 billions of dollars for because we used the labels in Android,
15 they made the whole thing public and free for anybody to use in
16 2007.

17 They are the ones that gave lots of folks incentive to
18 stop paying license fees if they can get the same thing for
19 free, which is what OpenJDK is all about. Open Source SE 5.0
20 from Sun itself.

21 I'll close by saying thanks again.

22 But our main point is that Android is precisely the kind
23 of thing that fair use was intended to encourage. It's a leap
24 forward to a new platform, creating a new market for innovation
25 not just by Google but by lots and lots of other people. Other

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1 manufacturers, application developers, wireless carriers. It's
2 become a whole community because Google made it open and free.

3 And Mr. Ellison wants to shut it down. He wants Java back
4 in his pocket. And that is not fair. That is not right. And
5 that is not what fair use or copyright was ever intended to
6 allow.

7 So I'll thank you for your time and attention again. Our
8 case will start in just a few minutes. And I think the judge
9 will have some instructions for you. And thanks, once again,
10 for all the time and attention that you're paying to our case.

11 **THE COURT:** All right. Thank you, Mr. Van Nest.

12 I'm going to read to the jury about 12 minutes of an
13 instruction. I've learned that many members of the public
14 don't want to sit through it. So if you're going to leave at
15 all, leave now so that you will not distract the jury.

16 (Pause)

17 **THE COURT:** Thank you. I appreciate the public giving
18 the jury the benefit of no distractions.

19 Usually we give the instructions of law at the end of the
20 case and I will, of course, do that at the end of the case, but
21 the lawyers have suggested on both sides that I do what's
22 called pre-instructing you; that I give you some instruction up
23 front so that it will help, you as you hear the evidence,
24 catalog what you're hearing and how it's relevant.

25 And I agreed to do that and I worked through several

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1 drafts with the lawyers. I can't tell you that they agree with
2 everything I'm about to tell you, but I'm giving you my best
3 judgment of it, and I reserve the possibility that some changes
4 will be made by the end of the case so that this is my first
5 cut at it, but it's received a lot of attention. I don't think
6 there will be many changes at the final stage, but there could
7 be some. So take it with that in mind.

8 This will take about 12 minutes. I will not give you a
9 hand-out copy. I will give you a hand-out copy at the end of
10 the case because that is a final version, but this is a
11 preliminary version that will be close, but not final enough.
12 I'm only going to read it to you this one time, and if you want
13 to make notes, great. If you don't want to make notes, that's
14 okay, too. So bear with me while I do this.

15 "In this trial, it has already been established that the
16 Android versions in question used aspects of Java 2 Standard
17 Edition Version 1.4 and Java 2 Standard Edition Version 5.0,
18 specifically using the declaring code and structure sequence
19 and organization of 37 Java API packages.

20 "The pertinent Android versions were 1.0, 1.1. Cupcake,
21 Donut, Eclair, Froyo, Gingerbread, Honeycomb, Ice Cream
22 Sandwich, Jelly Bean, KitKat, Lollipop, and Marshmallow.

23 "Even though the Java programming language was freely
24 usable by Google and others, Google's use of the declaring
25 lines of code and the structure sequence and organization of

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1 those 37 API packages constituted copyright infringement under
2 the Federal Copyright Act of 1976, unless you find that Google
3 has carried its burden of proof as to the defense of fair use.

4 "In other words, for purposes of this trial, it has
5 already been established that Google used certain aspects of
6 copyrighted works, and the question remaining for you to decide
7 is whether or not Google's use was a fair use.

8 "There is no contention, however, that Google copied the
9 implementing code for the 37 APIs. The point of contention is
10 over the declaring lines of code within the 37 APIs, also known
11 as header lines, which Google concededly used in Android as
12 well as the overall structure, sequence, and organization of
13 these 37 APIs.

14 "This dispute will involve the details of the method
15 names, class names, and declarations definitions, parameters
16 and organization.

17 "Now I will explain what *fair use* means under the law.
18 One policy behind our copyright law of course is to protect the
19 compositions of authors from exploitation by others. When it
20 applies, however, the right of fair use permits the use of
21 copyrighted works by others without the copyright owner's
22 consent.

23 "The policy behind the right of fair use is to encourage
24 and allow the development of new ideas that build on earlier
25 ones, thus providing a counterbalance to the copyright policy

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1 to protect creative works.

2 "Since the doctrine of fair use is an equitable rule of
3 reason, no generally-accepted definition is possible and each
4 case raising the question must be decided on its own facts.
5 And in this dispute between Oracle and Google that question
6 falls to you for decision.

7 "Under the Copyright Act of 1976, an author owns the
8 exclusive right to use or to license his or her writings or
9 images or other copyrightable works with the statutory
10 exception that anyone may make fair use of even a copyrighted
11 work and may do so without anyone's permission and without
12 payment of money to anyone. Specifically the act states" --
13 and I will quote it exactly -- "the fair use of a copyrighted
14 work for purposes such as criticism, comment, news reporting,
15 teaching, including multiple copies for classroom use,
16 scholarship, or research is not an infringement of copyright.
17 In determining whether the use made of a work in any particular
18 case is a fair use, the factors to be considered shall include,
19 one, the purpose and character of the use, including whether
20 such use is of a commercial nature or is for nonprofit
21 educational purposes."

22 I'm going to repeat that again.

23 "One, the purpose and character of the use, including
24 whether such use is of a commercial nature or is for nonprofit
25 educational purposes.

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1 "Two, the nature of the copyrighted work."

2 I'll repeat that.

3 "Two, the nature of the copyrighted work.

4 "Three, the amount and substantiality of the portion used
5 in relation to the copyrighted work as a whole. Three, the
6 amount and substantiality of the portion used in relation to
7 the copyrighted work as a whole.

8 "And, four, the effect of the use upon the potential
9 market for or value of the copyrighted work."

10 To repeat, "four, the effect of the use upon the potential
11 market for or value of the copyrighted work."

12 That's the end of the quote. I have just quoted for you
13 the right of fair use exactly as enacted by Congress in 1976.

14 "In your deliberations, you must decide whether or not
15 Google has met its burden in this trial to prove that its
16 copying was a fair use.

17 "Now I will further explain each of the four statutory
18 factors. The first statutory factor concerns the purpose and
19 character of the accused use. This factor includes these
20 issues: One, whether and to what extent the accused use serves
21 a commercial purpose which weighs against fair use versus a
22 nonprofit educational purpose which weighs in favor of fair
23 use; and, two, whether and to what extent the accused work is
24 transformative, which supports fair use.

25 "Although the act does not explicitly use the word

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1 *transformative*, our courts uniformly hold that the first
2 statutory factor calls for an evaluation whether and to what
3 extent the purpose and character of the accused work is
4 transformative.

5 "What does *transformative* mean? A use is transformative
6 if it adds something new with a further purpose or different
7 character altering the first use with new expression, meaning,
8 or message rather than merely superseding the objects of the
9 original creation.

10 "New works have been found transformative when they use
11 copyrighted material for purposes distinct from the purpose of
12 the original material. A use is considered transformative only
13 where a defendant changes a plaintiff's copyrighted work, or
14 where the copyrighted elements remain unchanged from the
15 original, a defendant uses them in a different context such
16 that the original work is transformed into a new creation.

17 "A work is not transformative where the user makes little
18 or no alteration to the expressive content or message of the
19 original work and uses it in the same or similar context.

20 "The extent of transformation may vary from case to case.
21 The greater the transformation, the more likely an accused use
22 will qualify as a fair use, and the less the transformation,
23 the less likely an accused use will qualify as a fair use.

24 "In evaluating the first statutory factor, the extent of
25 the commercial nature of the accused use must be considered as

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1 stated. In this case, all agree that Google's accused use was
2 commercial in nature, but disagree over the extent.

3 "Commercial use weighs against a finding of fair use, but
4 even a commercial use may be found or not found, as the case
5 may be, to be sufficiently transformative that the first
6 statutory factor on balance still cuts in favor of fair use.
7 To put it differently, the more transformative an accused work,
8 the more other factors such as commercialism will recede in
9 importance.

10 "By contrast, the less transformative the accused work,
11 the more other factors like commercialism will dominate.

12 "Also relevant to the first statutory factor is the
13 propriety of the accused infringer's conduct because fair use
14 presupposes good faith and fair dealing. Where, for example,
15 the intended purpose is to supplant the copyright holder's
16 commercially valuable right of first publication, good faith is
17 absent. Under the law, if the use is otherwise fair, then no
18 permission need be sought or granted. Thus, seeking or being
19 denied permission to use a work does not weigh against a
20 finding of fair use.

21 "The second statutory factor"-- now we're at the second
22 factor.

23 "The second statutory factor is the nature of the
24 copyrighted work. This factor recognizes that traditional
25 literary works are closer than informational work, such as

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1 instruction manuals, to the core of the intended copyright
2 protection. Creative writing and expression lie at the very
3 heart of copyright protection. So fair use is generally more
4 difficult to establish for copying of traditional literary
5 works than for copying of informational works. The focus of
6 this statutory factor is on how close the used material is to
7 the core values of copyright protection. The less the used
8 materials implicates the core values of copyright protection,
9 the more viable will be fair use and vice versa.

10 "In this case, it is undisputed that the declaring code
11 and the structure sequence and organization of the 37 API
12 packages at issue were sufficiently creative and original to
13 qualify for copyright protection. *Original*, as the term is
14 used in copyright, means only that the work was independently
15 created by the author as opposed to copied from other works and
16 that it possesses at least some minimal degree of creativity.

17 "The extent to which the 37 API packages in question here
18 involve greater creativity than the minimum required to obtain
19 copyright is disputed and it is open for you to examine; that
20 is, you should consider the extent to which the used materials
21 were created and original versus functional. The more creative
22 the work, the less this factor favors fair use and vice versa.

23 "Even though a computer program performs functions and has
24 functional elements, the structure sequence and organization of
25 a computer program may be or may not be highly creative. When

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1 there are many possible ways to structure sequence and organize
2 a program, the particular weight chosen for a copyrighted
3 program and even individual lines of declaring code may be or
4 may not be highly creative. On the other hand, when the
5 declaring code and the structure sequence and organization are
6 dictated by functional considerations such as efficiency,
7 compatibility or industry standards, then less creativity is
8 indicated and the core values of copyright protection are less
9 implicated.

10 "When purely functional elements are embedded in a
11 copyrighted work and it is necessary to copy associated
12 creative elements in order to use -- utilize those functional
13 elements, then this circumstance favors fair use. Conversely,
14 copying creative expression that is not necessary to perform
15 the functions cuts against fair use.

16 "Google, of course, had the right to write its own code to
17 perform any function it wished because no one can get a
18 copyright on a general method of operation other than to get a
19 copyright on its specific implementation for that function.
20 Unless it was a fair use, however, Google did not have the
21 right to use the exact lines of declaring code and the overall
22 structure sequence and organization of the 37 API packages as
23 copyrighted by Sun and now owned by Oracle.

24 "Because Google was free to use the Java programming
25 language to write Android, you should also consider the extent

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1 to which you find it was necessary for Google to use any or all
2 of the declaring code and structure sequence and organization
3 of any of the 37 API packages to write in the Java language.
4 Such a finding to that extent only would support fair use.

5 "To the extent that you find that it was not necessary,
6 however, that finding would disfavor fair use. This
7 consideration also bears on the third statutory factor to which
8 I will now turn.

9 "The third statutory factor is the amount and
10 substantiality of the portion used in relation to the
11 copyrighted work as a whole which concerns how much of the
12 overall copyrighted work was used by the accused infringer.
13 Analysis of this factor is viewed in the context of Oracle's
14 copyrighted works, namely, Java 2 Standard Edition Versions 1.4
15 and 5.0, not Android. The fact, if true, that a substantial
16 portion of an infringing work was copied verbatim is evidence
17 of the qualitative value of the copied material, both to the
18 originator and to whoever seeks to profit from marketing
19 someone else's copyrighted work. Wholesale copying does not
20 preclude fair use per se, but it militates against a finding of
21 fair use.

22 "Even a small part may be qualitatively the most important
23 part of the work. If, however, the secondary user only copies
24 as much as is necessary for a transformative use, then this
25 factor will not weigh against him or her. The extent of

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1 permissible copying varies with the purpose and character of
2 the use which relates back to the first statutory factor. In
3 assessing this third statutory factor, both the quantity of the
4 material used and the quality or importance of the material
5 used should be considered."

6 Now we're to the last factor.

7 "The fourth and final statutory factor is the effect of
8 the accused infringer's use on the potential market for or
9 value of the copyrighted work. This factor militates against
10 fair use if the accused use materially impairs the
11 marketability or value of the copyrighted work. This is the
12 single most important statutory factor, but it must be weighed
13 with all the other factors and is not necessarily dispositive.
14 This factor considers whether the accused work is offered or
15 used as a substitute for the original copyrighted work. This
16 factor considers not only the extent of any market harm caused
17 by the accused infringer's actions, but also whether
18 unrestricted and widespread use of the copyrighted materials of
19 the sort engaged in by the accused infringer would result in a
20 substantially adverse impact on the potential market for the
21 copyrighted work.

22 "Market harm to the value of the copyrighted work may be a
23 matter of degree, and the importance of this factor will vary
24 not only with the amount of harm shown, but also with the
25 relative strength of the showings on the other factors. In

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1 connection with the fourth statutory factor, the term *potential*
2 *market for or value of* refers to the value of the entire
3 copyrighted work itself and licensing opportunities for the
4 copyrighted work via derivative works. A *derivative work* is a
5 work based upon one or more pre-existing copyrighted works such
6 as a musical arrangement or dramatization based on a book, to
7 name only two specifics, or any other form in which a work may
8 be recast or adapted.

9 "In this case, the copyrighted works in suit are Java 2
10 Standard Edition Versions 1.3 and 5.0 so the only derivatives
11 that count are those that derive from those two works.

12 "In making your evaluation under the fourth factor, you
13 should assess the harm, if any, to the potential market for or
14 value of the copyrighted work itself and to its licensing value
15 for derivative works. You may consider the broader potential
16 market for products that feature independent elements in
17 addition to the copyrighted material and their successes or
18 failures only insofar as they shed light on the licensing or
19 market value of the copyrighted work itself and its
20 derivatives. In doing this, moreover, you must ignore benefits
21 from the use to the copyright owner outside the genre claimed
22 to have been harmed.

23 "Actual present harm need not be shown, nor is it
24 necessary to show with certainty that future harm will result
25 so long as some meaningful likelihood of future harm exists.

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1 If the intended use is for commercial gain, that likelihood may
2 be presumed except where the second use is transformative
3 because in cases of transformation, market substitution is at
4 least less certain and market harm may not be so readily
5 inferred.

6 "I have now completed my explanation of the four factors
7 in the act. You might ask are we limited to these four
8 factors? The act states that the factors to be considered
9 include the four statutory factors and the law holds that those
10 four factors are not exclusive and you may consider any
11 additional circumstance in evidence, pro or con, that, in your
12 judgment, bear upon the ultimate purpose of the Copyright Act,
13 including protection of authors and the right of fair use,
14 namely, to promote the progress and science of useful acts --
15 progress of science and useful arts. It is up to you to decide
16 whether all relevant factors, when considered fully and
17 together, favor or disfavor fair use. All of these factors
18 must be explained, discussed, and evaluated by you. No single
19 factor is dispositive. Your evaluation of all factors must be
20 weighed together in light of the purpose of copyright, which,
21 as our Constitution states, is to promote the progress of
22 science and useful arts.

23 "Some factors may weigh in favor of fair use and some
24 against fair use, and you must decide, after giving the factors
25 such weight as you find appropriate based on the evidence,

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1 whether or not on balance Google has shown or will show by a
2 preponderance of the evidence that those factors predominate in
3 favor of fair use."

4 Okay. That's my preliminary instruction to you. Let me
5 ask you over there if you need to -- we can go straight to the
6 first witness unless somebody would prefer a restroom facility
7 break. If so, raise your hand.

8 Okay. We are going to take a 15-minute break at this
9 time. Please remember the admonition.

10 (Proceedings were heard out of presence of the jury:)

11 **THE COURT:** Do the lawyers need me for anything?

12 **MR. VAN NEST:** Just briefly, Your Honor. We have some
13 more deposition transcripts that Mr. Kamber will hand up.

14 **THE COURT:** Hand them to my law clerk.

15 **MS. HURST:** May we have until 2:00 p.m. for the brief?
16 We need to add some exhibits.

17 **THE COURT:** You may have until 2:00 p.m.

18 **MR. VAN NEST:** I take it that is for both of us?

19 **THE COURT:** Of course.

20 (Recess taken at 10:20 a.m.)

21 (Proceedings resumed at 10:55 am.)

22 (Proceedings were heard out of presence of the jury:)

23 **THE COURT:** Shall be go? Is there a witness ready?

24 **MR. VAN NEST:** Yes. Mr. Schmidt.

25 **THE COURT:** Why don't you come on up here and take the

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1 stand and then we will be all the more efficient.

2 **THE WITNESS:** Nice to see you again.

3 **THE COURT:** Welcome back. But don't say that in front
4 of the jury. We have an agreement not to refer to any of the
5 prior proceedings. So there we go.

6 We are going to have about two hours of testimony. How
7 long will the direct be?

8 **MR. VAN NEST:** I think about 45 minutes, Your Honor.
9 Something like that.

10 (Proceedings were heard in the presence of the jury:)

11 **THE COURT:** Mr. Van Nest, you will be calling your
12 first witness.

13 **MR. VAN NEST:** Thank you, Your Honor. Google calls
14 Eric Schmidt.

15 **ERIC SCHMIDT, DEFENDANT'S WITNESS, SWORN**

16 **THE CLERK:** Thank you.

17 **THE COURT:** Mr. Schmidt, welcome. And you need to
18 slide the microphone close enough to your voice that it picks
19 it up.

20 Why don't you say your name.

21 **THE WITNESS:** Eric Schmidt.

22 **THE COURT:** It's not on.

23 Dawn, the microphone must be on.

24 **THE WITNESS:** Is this better?

25 **THE COURT:** It's like old tube equipment. It takes a

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1 while to warm up, even though there is not a single tube in
2 there. Okay. Now try.

3 **THE WITNESS:** Can you hear me now? Oh, my God.

4 **THE COURT:** Very good. Go ahead, counsel.

5 **DIRECT EXAMINATION**

6 **BY MR. VAN NEST:**

7 **Q.** Good morning, Mr. Schmidt. Please introduce yourself to
8 the jury.

9 **A.** I'm Eric Schmidt. I'm the Executive Chairman of Alphabet,
10 parent of Google.

11 **Q.** Can you tell the jurors a little bit about your
12 background, where you grew up, where you went to school?

13 **A.** I grew up in Virginia. I went to Princeton and Berkeley.
14 I'm a computer scientist with a Ph.D.

15 **Q.** When did you graduate from Berkeley?

16 **A.** 1982.

17 **Q.** What did you study in your Ph.D. program?

18 **A.** My software -- my Ph.D. was on computer software and it
19 was on the way in which people build software networks.

20 **Q.** When did you become the Chief Executive Officer of Google?

21 **A.** 2001.

22 **Q.** And what brought you to Google?

23 **A.** I wanted to work with the two young founders and the Board
24 convinced me to take the job.

25 **Q.** Who were those founders?

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1 A. Larry Page and Sergey Brin.

2 Q. Can you tell the juror's just a little bit -- we'll come
3 back to Google, but give them a rough idea of your
4 responsibilities when you were CEO of Google?

5 A. I was CEO for about a decade, so ending in 2011. During
6 that time, I had sort of the operational management duties of
7 the company, although it's fair to say that Larry and Sergey
8 and I ran and made the strategic decisions as a group.

9 Q. When did you become chairman of Alphabet or when did you
10 become Chairman of the Board of Google?

11 A. Well, I've been Chairman of the Board since 2001 on and
12 off, and then in -- a year ago, Google decided to invert itself
13 and create a parent company called Alphabet and then the people
14 who were at that board became the Alphabet board. But they're
15 more or less the same for purposes of this discussion.

16 Q. When was it that you became Chairman instead of Chief
17 Executive Officer?

18 A. February 2011.

19 Q. Now, at some point after graduating from Cal, did you join
20 Sun Microsystems?

21 A. Yes. I joined Sun Microsystems as I finished my Ph.D. at
22 Berkeley in 1983.

23 Q. And at the time you joined Sun, what business was Sun in?

24 A. At the time -- well, Sun had invented a particular kind of
25 work station which looks a lot like a personal computer today.

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1 It was -- we -- it was one of the first that was used for
2 high-end graphics, fast networking, that sort of thing.

3 Q. Can you give the jurors just a brief thumbnail of your
4 career at Sun, what positions you held, what responsibilities
5 you had?

6 A. I was hired as an engineering software manager to manage
7 the then, you know, 10 people or so doing software, but it grew
8 very rapidly, and over the years, I eventually became the
9 Chief Technical Officer, and during that, I was also in charge
10 of the Java Project for a number of years.

11 Q. What is a Chief Technical Officer responsible for?

12 A. Because of my technical background, I was the technical
13 person in the business meetings, so as the company would decide
14 whether to go to a new market or new product, I was the
15 technical voice, if you will. I have also managed quite a few
16 of the researchers on some of the new projects.

17 Q. You mentioned Java. Did you -- at some point, did you
18 become responsible for Java?

19 A. Yes. Java was invented in the late '80s or -- sorry.
20 Late '80s, early '90s by a team that was reorganized under me
21 as part of my duties as Chief Technology Officer, so I was in
22 charge of Java for some years at Sun.

23 Q. And did you have direct responsibility for Java strategy
24 at Sun?

25 A. I was a member of the team. I was titularly in charge,

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1 but of course these decisions are not made by a single
2 individual and there were a number of people and myself who did
3 it.

4 **THE COURT:** I'm sorry. You're a little too close.
5 Can you push it back about half an inch? All right. Try that.
6 Thanks.

7 **MR. VAN NEST:** There we go. Thank you, Your Honor.

8 **Q.** Can you tell our jurors briefly, Mr. Schmidt, how the Java
9 language was developed at Sun?

10 **A.** There was a team run by a guy named James Gosling.

11 **THE COURT:** Now you are looking at the jury instead
12 of -- I'm sorry. I've got to do this; otherwise, they won't
13 hear.

14 **THE WITNESS:** There was a team headed by a brilliant
15 engineer -- his name is James Gosling -- and they had an idea
16 in the late 1980s to build software that would work on set-top
17 boxes, and if you remember the set-top boxes of the time, they
18 were connected to your television set. They were not powerful
19 at all.

20 So the idea was to build a new solution, literally a new
21 operating system. It was very clever, very visual, and it was
22 called -- the project was called Oak.

23 **BY MR. VAN NEST:**

24 **Q.** Why did it take so long to develop a language like Oak?

25 **A.** It just takes forever. The iteration -- there are

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1 relatively a small number of computer languages that come to
2 prominence in the world, and there is something about the
3 design and the judgment and the art and so forth that this
4 particular team was unusually good at.

5 So to continue, Oak was actually built in a completely
6 separate building, and then at some point, we agreed to make it
7 part of our core Internet strategy. This is when I was at Sun.
8 And that's why I took it over.

9 **Q.** Okay. And what was that core Internet strategy?

10 **A.** This is again 1992/1993. There was a browser that had
11 just come out from a company called Netscape, and the idea was
12 to animate the use of the Internet with this new technology,
13 but it also solved an important problem for Sun at the time,
14 which was called *write once/run anywhere*.

15 At the time, there was no program language that you, as a
16 programmer, could write your code in that could run on all the
17 different kinds of computers that people had, and so the joke
18 about Java was we built it -- you could write it once. It
19 would run on any kind of computer, whether it was a personal
20 computer, a Macintosh, or other ones at the time.

21 **Q.** Were you personally involved in releasing the language
22 when it was finally built?

23 **A.** Yes. I actually announced it here at Moscone Center in
24 May of 2005. The announcement was not very well understood.
25 Maybe we didn't quite understand what we were doing, but we did

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1 announce it here in Moscone.

2 Q. I want to call your attention to our --

3 THE COURT: 2005 doesn't sound right.

4 THE WITNESS: I'm sorry. I'm sorry. I apologize,
5 guys. 1995. Twenty years ago.

6 BY MR. VAN NEST:

7 Q. Twenty years ago. At Moscone Center right here in
8 San Francisco.

9 Did Sun -- how was the Java language released? Was it
10 released for anyone to use?

11 A. Sun had a -- at the time, a license for the implementation
12 which you would sign up for and it also had a trademark license
13 which included the Java logo that you could pay a fee for.

14 Q. How about the language itself? How was that made
15 available?

16 A. The language was -- we published a book along with its
17 interfaces, as we call them, and those were called the *Java*
18 *Language Manual*.

19 Q. And was the Java book available and free for anyone to
20 use?

21 A. Yes.

22 Q. And the language, was a fee charged for using the Java
23 language at that time?

24 A. There was no charge to use the language. However, if you
25 wanted to use the implementation of the language, you would

1 have to pay a fee.

2 Q. When you say *implementation of the language*, tell our
3 jurors what you mean.

4 A. A language is like a -- like math in the sense that you
5 write it down and it tells the computer what to do. But the
6 other side of that that actually does the work is programmed by
7 other people, by a computer -- by typically programmers
8 somewhere else. I'm trying to think of a good example.

9 When you think about a power plug in a -- in like this
10 room, there's something behind it that's providing the power,
11 but from your perspective, it's just a plug. You don't know
12 how it was implemented.

13 So in a computer language, there has to be something that
14 does what you asked it to do. That's the implementation.

15 Q. That's the implementation?

16 A. That's right.

17 Q. All right. Now, did Sun make efforts to popularize the
18 use of the language itself?

19 A. Yes. I was in charge of that.

20 Q. How did you go about doing that?

21 A. Well, we had the idea that we would get everyone to use
22 our implementation, so I went from company to company to
23 sell/license the implementation to everybody. And that would
24 include Oracle, Microsoft, Netscape, the other players at the
25 time.

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1 Q. What about the language itself? Did Sun make efforts to
2 promote the language and its use?

3 A. Well, of course. We wanted everyone to use the language
4 because the more people who would use the language, the more --
5 the bigger the ecosystem that would be built would occur.

6 Q. How did you go about promoting the language? Was it
7 taught?

8 A. Yes. But we had big programs -- we decided to try to get
9 computer science schools to teach it, so there were textbooks
10 that were developed in universities, and the theory was that
11 young programmers would emerge with the ability to use this
12 language and do amazing things.

13 Q. What is JavaOne?

14 A. JavaOne was a conference that we held also here at Moscone
15 which I was in charge of when I was at Sun, and the idea was to
16 get all of the people in the ecosystem in one place. And we
17 had our -- a huge JavaOne conference. All the programmers
18 came. We celebrated the brilliance of our ideas and our
19 accomplishments.

20 Q. Did JavaOne become an annual event?

21 A. Yes.

22 Q. And continues on through the '90s and beyond as well?

23 A. Yes. It was of immense scale.

24 Q. Are you familiar with the term API, Application
25 Programming Interface?

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1 **A.** Yes.

2 **Q.** What is that?

3 **A.** If you're a programmer, you want something to happen, and
4 you have to call up -- called procedures or methods or what
5 have you that somebody else wrote. The programming interface
6 is how you make that happen.

7 So if I asked you to jump, now I'm a programmer, I would
8 say, *Mr. Van Nest, jump*, and you would hear that as a -- as an
9 interface, and then you'd say, *Ah, I know how to jump*. But
10 somebody else might jump at a different way. All I said was
11 *jump*. I didn't say how. It's sort of that -- think of it is
12 as a programmer directs the computer to do something for them
13 through an interface.

14 **Q.** Can you distinguish that from the implementing code that
15 you talked about a minute ago?

16 **MR. BICKS:** Your Honor, I would object on expert
17 testimony if we're going to get into detail here.

18 **MR. VAN NEST:** This is just background, Your Honor.

19 **THE COURT:** No. Sustained. Was he designated as an
20 expert?

21 **MR. VAN NEST:** No, Your Honor.

22 **THE COURT:** Well, you have to stick to the past tense
23 and not -- do not veer off into expert subject matter. You're
24 asking him a present tense question. He was not designated as
25 an expert. So you have to stick to his biographical timeline

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1 and what he did at Sun.

2 **MR. VAN NEST:** Thank you, Your Honor.

3 **Q.** Mr. Schwartz -- Mr. Schmidt, excuse me -- were you in
4 charge of the development of the Java APIs during your time as
5 CTO at Sun?

6 **A.** I was.

7 **Q.** And what responsibilities did you have for that?

8 **A.** Well, my -- my objective and therefore my job was to get
9 widespread adoption of these interfaces and of course as many
10 licenses for the implementation as I could.

11 **Q.** Okay. And when Sun first released the language, were the
12 Java APIs included along with it?

13 **A.** Yes.

14 **Q.** And why was that done?

15 **A.** It's not possible to use a language without its -- the
16 interfaces. The language by itself -- again, I'm using the
17 stupid example, maybe a better example, of jump. Let's say
18 that I wanted you to jump, but I had no way of calling it. I
19 had no way of making it happen. So that's why we needed to
20 have the -- those interfaces as part of our package.

21 **MR. BICKS:** Your Honor, again, I would object as this
22 is now expert testimony, and we're going back to mid 1990s.

23 **THE COURT:** Well, I'll allow the answer to stand, but
24 the witness needs to -- you were not designated as an expert.
25 He asked you a past-tense question and you leaped forward to

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1 present tense answer.

2 I've got to go with the Rules of Evidence. You were not
3 designated as an expert. You've got to stick to what happened
4 back then.

5 And, counsel, you have to stick to what happened back
6 then. He does have past tense knowledge about what --
7 percipient knowledge about the development of Java back then,
8 but don't skip forward to some of these present tense problems.

9 I need to say to the jury, both sides have argued with me
10 over this problem. There are a set of rule books about what
11 you have to disclose and who gets to be an expert and all that
12 stuff. And I have got to stick with the rules. I'm just going
13 to follow the rule book. So both sides are going to be doing
14 this during the trial. So that's the answer.

15 Go to the next question in the past tense.

16 **MR. VAN NEST:** Yes. I will, Your Honor.

17 **Q.** How did Sun make the Java APIs available during the time
18 you were CTO, Mr. Schmidt?

19 **A.** Well, as I -- as I indicated, at that time, there was a
20 book that included a specification for all those APIs.

21 **Q.** Okay. And was that free and open for anyone to use?

22 **A.** Yes.

23 **Q.** And how did you expect developers to use the APIs?

24 **A.** Well, at the time, the way a programmer would call those
25 APIs is they would include them in their code.

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1 Q. Now, how was Sun planning to make money, if it was giving
2 the language and the APIs away for free?

3 A. So there were many reasons why this was beneficial to Sun
4 at the time. One was that this lack of *write once/run anywhere*
5 meant that our computers could not be commingled with other
6 people's computers. So the strategy allowed us to sell more
7 hardware. That's one aspect of the revenue plan. But the
8 other revenue plan was to also get some licensing revenue from
9 the deals that we did.

10 Q. Did Java also have a trademark associated with it?

11 A. It did.

12 Q. What was that?

13 A. It was a coffee cup logo.

14 MR. VAN NEST: Could we put the coffee cup logo up,
15 please.

16 THE COURT: Is this an exhibit somewhere?

17 MR. VAN NEST: It's a graphic, Your Honor.

18 THE COURT: Well, is this coming into evidence? Or is
19 this just illustrative --

20 MR. VAN NEST: It's just for illustrative --

21 THE COURT: Any objection?

22 MR. BICKS: No, Your Honor.

23 THE COURT: All right. Go ahead.

24 BY MR. VAN NEST:

25 Q. Tell the jury, what's the coffee cup and was it

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1 licensed --

2 **THE COURT:** Is this coming through in the jury box?
3 Please let the jury see it in the jury box.

4 **MR. VAN NEST:** There it is. There it is.

5 **Q.** What are we looking at, Mr. Schmidt?

6 **A.** So this is the Java logo, and the idea -- the idea that we
7 had was this would help promote the use of Java because of
8 course it's a pun on coffee.

9 **Q.** Now, did Sun charge a license fee for people to use the
10 Java cup in connection with their own products?

11 **A.** Yes, we did.

12 **Q.** Why was that?

13 **MR. BICKS:** Your Honor, again, we're in the Sun's
14 licensing practices during the mid '90s, which the Court had
15 indicated previously was of marginal relevance here.

16 **THE COURT:** Overruled. No. I'm going to allow this.
17 It's past historical development. We have heard about
18 licensing from you, Mr. Bicks, and so this is fair game for the
19 moment. I'll see where it goes. Go ahead.

20 **BY MR. VAN NEST:**

21 **Q.** Now, at that time, would Sun have permitted someone to use
22 their own version of Java to call it Java without paying a fee?

23 **A.** We had a trademark license, and so if you wanted to say
24 that it was the Java from Sun, you had to have this picture and
25 you had to fulfill the terms of the trademark license.

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1 Q. At that time, could you build your own version of Java as
2 long as you didn't call it Java without paying a fee to Sun?

3 MR. BICKS: Again, objection, Your Honor.

4 THE COURT: Sustained. That calls for a lot of
5 opinion. He has not been designated as an expert.

6 BY MR. VAN NEST:

7 Q. Mr. Schmidt, when did you leave Sun?

8 A. 1997.

9 Q. And what did you do next?

10 A. I became the CEO of a company called Novell.

11 Q. When did you arrive -- well, tell us a little bit about
12 Novell. Where is Novell located and what did you do there?

13 A. Novell is a company that was headquartered in Provo, Utah,
14 and it was a networking company, networking software.

15 Q. I think you told us you arrived at Google in 2001?

16 A. That is correct.

17 Q. And took a position as CEO at that time?

18 A. That is correct.

19 Q. Could you describe for our jurors generally what is
20 Google's business and how does Google make money?

21 A. Virtually all the revenue of Google comes from its
22 advertising products, and I'm sure you all have seen them over
23 the years, the little blue links. People click on them and the
24 sum of that is many billions of dollars across many different
25 users globally and so forth. It's essentially an advertising

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1 company, and the majority of the revenue comes from those links
2 that you see when you do a Google search.

3 Q. Does Google create new products?

4 A. All the time.

5 Q. And does Google invest in research and development to make
6 that happen?

7 A. A great deal of investment in R&D.

8 Q. How big a part of Google is research and development,
9 Mr. Schmidt?

10 A. The general guideline is about 50 percent of Google is
11 associated with R&D, so a very high number in the industry.

12 Q. Can you give our jurors some examples of Google products?

13 A. Well, I'm sure you're familiar with Gmail. I'm sure
14 you're familiar with Google Earth and Google Maps. Obviously
15 Android is part of this discussion here. Many, many others.

16 Q. Does Google make its consumer products available for free
17 to consumers?

18 A. Our -- our -- our global users as a general rule do not
19 pay a fee, and we make our money from advertising that comes
20 from with -- or travels with those programs.

21 Q. You mentioned search. When was Google Search created?

22 A. It was invented by Larry and Sergey when they were
23 graduate students at Stanford, and they founded the company
24 based on their success of the algorithm called PageRank, and
25 this is roughly 1998.

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1 Q. What is Google Ads?

2 A. So one of the ideas they had was how do we make money? We
3 have this great search product, and so the idea was we would
4 take the advertising and tie it to the ads, so if you were
5 looking for a digital camera, then we would show an ad for a
6 digital camera, the people would click on that, and then people
7 purchase the camera.

8 Q. Are Google Search and Google Ad separate technologies from
9 Android?

10 A. Yes.

11 Q. Give us a little background, Mr. Schmidt. What is
12 Android?

13 A. Android is the name of an operating system that runs on
14 smartphones. Would you like me to describe its components
15 or --

16 Q. No. What was the concept behind Android?

17 A. I see. So the problem at the time was that smartphones
18 were just starting, and there was the idea that we could build
19 a mobile operating system that would get wide adoption, a lot
20 of people -- it would drive new ways people would use mobile
21 computing, and it started again -- and I think it's on your
22 timeline even. And Android is a company that was founded by a
23 fellow named Andy Rubin, and we acquired the company when it
24 was very small.

25 Q. Did you have ultimate responsibility for Android at

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1 Google?

2 A. Yes.

3 Q. Has Google developed mobile products for other devices
4 than just Android?

5 A. Well, an example -- I mentioned that we made most of our
6 money from Search. We have a search product that runs on the
7 iPhone which would be a well-known example. But there are
8 plenty of other mobile products that -- a good example would be
9 Google Maps.

10 Q. That runs on other platforms --

11 A. Yes. It runs on many platforms, but primarily the iPhone
12 and Android.

13 Q. Let's go to our timeline, Mr. Schmidt. We have on it July
14 2005, Google acquires Android. What was the purpose for
15 acquiring Android?

16 A. At the time, Android was very small, and the idea was that
17 it would be useful to have a mobile operating system that would
18 be much more powerful for the smartphone than the earlier, what
19 we called, feature phones or people would say dumb phones. So
20 it was just becoming clear that powerful phones or powerful
21 screens would become available. You know this today as the
22 iPhones/Android phones that you use every day here in the
23 courtroom.

24 Q. When Google acquired Android, was there a fully-baked
25 smartphone available from Android at that point?

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1 **A.** No. The work that had been done was simply preparatory.
2 It was exploratory. It was research and development, and the
3 first Android phone did not come out until years after the
4 acquisition.

5 **Q.** And were there various options for Google in building
6 Android?

7 **A.** Well, we purchased Android.

8 **Q.** Right.

9 **A.** So we had the choice of not purchasing Android and doing
10 something else. We had tried strategies before involving
11 partnerships with telecommunications companies, but none of
12 them worked very well. They were just bad products, if I could
13 be blunt.

14 **Q.** Okay. And once Android came in, once Android had been
15 acquired by Google, did you still have options as to how to
16 build it, whether to buy it or build it internally?

17 **A.** We had many choices once we acquired because we needed to
18 fill out the offering. And at the time, if you wanted to build
19 a smartphone, you had to pay a lot of different fees to a lot
20 of different players.

21 So typical example is that there is the thing that does
22 audio and video. You had to pay a royalty or fee to use this
23 particular piece of software. So our idea was that we would
24 have an offering, a piece of software, that would pay off all
25 of those royalties. In other words, it would be free software

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1 to the licensee who wanted to use it. This is called an open
2 source. And it was revolutionary at the time.

3 **Q.** Why was it so revolutionary?

4 **A.** Because most people were trying to pay for their
5 implementations by licensing, but we thought we will just allow
6 it to be freely licensed, and we could always make money from
7 our applications.

8 **Q.** Your applications being things like Search?

9 **A.** I think Search would be a primary example there.

10 **Q.** Early on, did you consider partnering with Sun to develop
11 Android?

12 **A.** We did.

13 **Q.** At that time, did Sun have a Java product for use in
14 mobile phones?

15 **A.** At the time -- and, again, remember I'm now at Google so
16 these are my friends at Sun, but I'm not at Sun anymore.
17 Google had Android, and we thought it would be a good idea to
18 take what is called the Java Mobile and put it inside of this
19 Android product. We thought that that would be good for
20 everybody. I'm obviously very pro Java, etc.

21 **Q.** And did Google expect Android to be different from what
22 existed at that time? By that I mean feature phones?

23 **A.** Our view of Android was there was never anything like it
24 and it was completely different from any other approach. There
25 was nothing like -- we were building something new from our

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1 experience.

2 Q. What did you see as the benefit to Google as a partnership
3 with Sun?

4 A. Well, I had an emotional reason why I thought it would be
5 good to work with Sun from my own history, but as a technical
6 matter, I liked the team, I liked the implementation that they
7 had done because I had overseen it, and it would be good to
8 have that quality inside of our phone, in my view.

9 Q. And what is the technology you were hoping Sun would
10 contribute to the partnership?

11 A. So if we go back to this business about implementations,
12 there was an implementation that the Java people had done on
13 the Sun side that we -- that if we just put it in our phone, it
14 would allow people to write applications and invent the future
15 in interesting ways. We did not understand at the time how it
16 would be used, but we thought it would be useful.

17 Q. And were you considering using the Java logo and brand,
18 too?

19 A. Yes. That would be ideal because, again, we liked the
20 logo, we liked the brand.

21 Q. Would there have been a time advantage to Google if you
22 had been able to work out a partnership with Sun?

23 A. Well, probably.

24 MR. BICKS: Objection, Your Honor. Hypothetical.

25 THE COURT: You may rephrase that. It's improperly

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1 phrased. You should phrase it to say at the time, did you
2 consider whether or not there was an advantage, and if he, in
3 fact, did consider that back then, then that would be a
4 historical fact. He can testimony to that. But the way you
5 phrased it calls for present-day opinion.

6 **BY MR. VAN NEST:**

7 **Q.** At the time, did you consider whether there would have
8 been an advantage in time from a partnership with Sun?

9 **A.** I believed that there would, although I was not sure.

10 **Q.** Now, did you participate in some of the discussions with
11 Sun?

12 **A.** I did.

13 **Q.** And I want to get our jurors oriented to the timeline.
14 We're showing that they began sometime in August of 2005 and
15 continued into 2006. Is that consistent with your general
16 recollection?

17 **A.** That is correct.

18 **Q.** Okay. And who is it that you were talking with at Sun?

19 **A.** I spoke to both Scott McNealy, who was my -- had been my
20 boss, and I believe at the time was the chairman. And I also
21 spoke with Jonathan Schwartz, who I believe at that time was
22 just -- was the CEO -- was just about to become the CEO of Sun.

23 **Q.** And did you and Mr. Schwartz or you and Mr. McNealy
24 exchange emails at the time?

25 **A.** We did.

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1 **MR. VAN NEST:** Your Honor, may I approach the witness?

2 **THE COURT:** Yes, you may.

3 **BY MR. VAN NEST:**

4 **Q.** I'm showing you Trial Exhibit 205.

5 **A.** Okay.

6 **Q.** Do you recognize that, Mr. Schmidt?

7 **A.** I do.

8 **Q.** What is it?

9 **A.** This is an email that is from Scott McNealy from Sun back
10 to me, which includes the message I sent to him before.

11 **MR. VAN NEST:** I would offer 205 into evidence,
12 Your Honor.

13 **MR. BICKS:** No objection.

14 **THE COURT:** Received in evidence.

15
16 (Trial Exhibit 205 received in evidence)

17 **MR. VAN NEST:** Can we display it on the screen?

18 **THE COURT:** You may. Is that coming through in the
19 jury box? Yes, it is. Go ahead.

20 **BY MR. VAN NEST:**

21 **Q.** You start there -- we're going to read these from the
22 bottom to the top, Mr. Schmidt.

23 You start off at the bottom, "Scott, I'm in a product
24 review, and we're looking at a very interesting partnership
25 proposal with Sun."

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1 What is the partnership proposal that you were looking at
2 at the time?

3 **A.** For the benefit of everybody, the first message is the
4 second of the two that you see, so what you're reading is
5 something I sent to Scott.

6 **Q.** Right.

7 **A.** So I'm in product review and we're looking at a very
8 interesting partnership proposal with Sun. Yes.

9 **Q.** And what's the nature of the proposal you were
10 considering?

11 **A.** Well, a part of this was this discussion about using Java
12 licensed implementation in our platform.

13 **Q.** Now, if were you in going to use the Java-licensed
14 implementation, would you have had to pay a fee for that and
15 license it?

16 **A.** If we were to get the implementation from Sun, yes,
17 absolutely.

18 **Q.** And the coffee cup logo, would that have required a
19 license fee as well?

20 **A.** It would have as well.

21 **Q.** That's what you were considering doing at the time?

22 **A.** Right. Think of this as I'm telling him we are
23 considering such a deal.

24 **MR. BICKS:** Your Honor, objection.

25 **THE COURT:** What is the objection?

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1 **MR. BICKS:** It's not responsive to any question.

2 **THE COURT:** I'm sorry. I --

3 **MR. VAN NEST:** I think it's directly responsive,
4 Your Honor.

5 **THE COURT:** Well, it's editorial comment. I probably
6 should have sustained the objection at the time. I'll let it
7 go. We've got to just stick with the historical facts rather
8 than editorializing now.

9 Unless, Mr. Bicks, if you're going to be asking questions
10 on cross that allow -- that calls for the same kind of thing,
11 then we might as well just start doing it now because I'm going
12 to let them do it on redirect if you do it because you can't
13 have it both ways. So keep that in mind.

14 Next question.

15 **BY MR. VAN NEST:**

16 **Q.** You go on to say, "It's an opportunity for our two
17 companies to work together to define the de facto standard
18 software stack." What is the de facto standard software stack
19 you're referring to there?

20 **A.** Well, the standard -- the term *standard* -- the term
21 *standard software stack* at the time meant all of the software
22 that a developer or user would need to use a smartphone.

23 **Q.** Did Mr. McNealy respond?

24 **A.** Yes. His response is above.

25 **Q.** And he said, "Thanks for the note. Jonathan and team are

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1 on top of this." Who is he referring to?

2 A. He is referring to Jonathan Schwartz and his employees.

3 Q. He says, "I'm worried about how we're going to replace the
4 revenue. This is likely to submarine. I'm very supportive of
5 driving a completely open phone stack."

6 Did you understand what Mr. McNealy was saying there?

7 A. Yes.

8 Q. What was that?

9 A. So I read this as he would like to do a deal. He has some
10 revenue that he might lose if he does our deal, and he wants to
11 make sure that he gets that revenue from us.

12 Q. Okay. Did you continue discussions further on with
13 Mr. Schwartz or Mr. McNealy?

14 A. I did.

15 Q. Were there further emails?

16 A. Yes.

17 MR. VAN NEST: Your Honor, may I approach the witness?

18 THE COURT: Yes.

19 BY MR. VAN NEST:

20 Q. Mr. Schmidt, I'm handing you TX435. Do you recognize
21 that?

22 A. I do.

23 Q. What is it?

24 A. This is a message from Jonathan Schwartz to me copying
25 Scott McNealy and Sergey Brin, who is the co-founder of Google.

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1 **MR. VAN NEST:** Your Honor, I would offer 435 in
2 evidence.

3 **MR. BICKS:** No objection.

4 **THE COURT:** Thank you. Received.

5 (Trial Exhibit 435 received in evidence)

6 **MR. VAN NEST:** May we display it?

7 **THE COURT:** When I say it's received in evidence, you
8 can go ahead. You don't have to ask me to display it again
9 once it's in evidence.

10 **BY MR. VAN NEST:**

11 **Q.** Mr. Schwartz says right in the first line, "My team has
12 alerted me that our negotiations to jointly create a Java/Linux
13 mobile platform are at an impasse."

14 Do you know what he was referring to, Java/Linux mobile
15 phone?

16 **A.** That's his word for our Android project.

17 **Q.** Had you made clear to him that you were using Java in
18 Android?

19 **A.** That was part of the discussions, yes.

20 **Q.** What is Linux?

21 **A.** Linux was the part of the software that was part of
22 Android at the bottom. So the way this worked was that Linux
23 was at the bottom and then there was software on top of it.

24 **Q.** He says in the second paragraph -- third paragraph, "Sun
25 is ready to embrace Google's innovation in order to make sure

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1 Google apps will shine. However, we're not willing to cede
2 complete control of the management for key components of the
3 stack."

4 What was the basis of the discussion at that point? What
5 was the impasse?

6 **A.** Each company had a different way it wanted to approach the
7 market. In our case, our model required that we give the
8 software out to the community as a whole. The Sun group had a
9 different model. And the two models were not the same.

10 **Q.** Okay. Did discussions continue following -- excuse me.
11 Let me get down to the last paragraph. He says, "Sun has key
12 technology assets, as well as enormous depth in creating
13 communities in ecosystems."

14 What key technology assets were you talking about with Sun
15 at that time?

16 **A.** Well, it turns out that we had a set of deals with Sun
17 involving search technology, tool bars, distributing Java in
18 other ways.

19 **Q.** But he's talking about "our Java/Linux phone." My
20 question is "Sun has technology assets as well as enormous
21 depth." Was he referring to something in connection with the
22 phone project?

23 **A.** Well, Sun had its mobile partners. It had its own
24 enterprise software on Java, a large set of products that it
25 had built as well.

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1 Q. Following this, was there further discussion?

2 A. Yes.

3 MR. VAN NEST: Your Honor, can I approach the witness?

4 THE COURT: Yes.

5 BY MR. VAN NEST:

6 Q. Do you recognize TX 2372? Actually, Mr. Schmidt, turn to
7 the second page. Your email is on the back.

8 A. I'm sorry. I did not recognize the first page.

9 Q. Do you recognize the email on the back?

10 A. I do.

11 Q. What is it?

12 A. This is a message from me to Jonathan congratulating him
13 on his promotion.

14 MR. VAN NEST: Your Honor, I would offer 2372 in
15 evidence.

16 MR. BICKS: No objection.

17 THE COURT: Thank you. Received.

18 (Trial Exhibit 2372 received in evidence)

19 BY MR. VAN NEST:

20 Q. Let's display the second page of Mr. Schmidt's email. You
21 are congratulating Mr. Schwartz. What are you congratulating
22 him on?

23 A. He had been promoted to CEO and Scott had been promoted to
24 chairman.

25 Q. This was in May of 2006?

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1 **A.** That's correct.

2 **Q.** Now, in that large second paragraph, you start by saying,
3 "I got your message about a potential partnership between
4 Google mobile Android and Sun Java." Is that the same
5 partnership discussion we've been referring to?

6 **A.** Yes.

7 **Q.** You go on to say about halfway down, "Google has made
8 considerable investment in this area and we're starting to see
9 solid progress. Although well under way, we're still open to
10 having Sun contribute components of the stack."

11 What were you referring to in the progress that Google had
12 made by this point?

13 **A.** Well, as you build these platforms, you start with little
14 pieces and you build more and more of the components, so an
15 example would be thinking about pieces of a smartphone. You
16 just have to build all of those pieces. Those are called
17 components.

18 **Q.** And you mention that you're still open to having Sun
19 contribute components of the stack. What Sun components were
20 you and Sun discussing at that point?

21 **A.** So Sun had an objective of having many of the pieces of
22 software that Sun had built separately added to our effort, and
23 we were open to that.

24 **Q.** And that's proprietary software?

25 **A.** Yes.

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1 Q. That would have required a fee?

2 A. And more importantly, a deal, yes.

3 Q. Very good.

4 Were you able to reach agreement with Sun over Android,
5 Mr. Schmidt?

6 A. We were not.

7 Q. Can you tell the jury why the deal discussions broke down?

8 A. You can see that in the third paragraph.

9 Q. Okay.

10 A. "However, Google should have the final say as to which Sun
11 technology is contributed to the open platform since Google is
12 writing the check."

13 Q. What check were you talking about?

14 A. This would be a fee to -- fee from Google to Sun for the
15 implementation.

16 Q. So, again, did the deal break down based on money, or was
17 it something else?

18 A. It broke down over who was in charge.

19 Q. How much money was being discussed at this time?

20 A. I was willing to pay -- these were initial discussions --
21 \$30, \$40 million kind of numbers, and that was in the
22 discussions that we had.

23 Q. What would that have purchased from Sun?

24 MR. BICKS: Again, objection, Your Honor. This is
25 completely speculative testimony.

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1 **THE COURT:** Sustained as phrased. There is no way for
2 him to know what he would have purchased unless there was a
3 firm offer on the table that he could testify to.

4 **MR. VAN NEST:** Okay.

5 **Q.** Had you identified for Sun the technology that you were
6 willing to have contributed to the platform?

7 **A.** There was the technical team that had done that.

8 **Q.** Now, after negotiations with Sun broke down, what, if any,
9 steps did Google take to complete Android?

10 **A.** We -- again, I'm trying to not be too technical here.

11 We used software that implemented the public interfaces of
12 Java to offer a different implementation of the interfaces that
13 Java has.

14 **Q.** How did you go about building the different
15 implementation?

16 **A.** We had a set of software programmers who worked -- they
17 just did a different implementation in a different place
18 without using the technology that Sun had developed.

19 **Q.** Did you use any Sun implementing code in Android?

20 **A.** We did not use any code that Sun had implemented to
21 implement the interfaces.

22 **Q.** And did you get the right to use the Java logo?

23 **A.** We did not.

24 **Q.** Was it your belief that you could use the Java language --
25 let's start with the language -- in Android, notwithstanding

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1 that you didn't have a partnership with Sun?

2 **MR. BICKS:** Objection on relevance, Your Honor.

3 **MR. VAN NEST:** Good faith, Your Honor.

4 **THE COURT:** No. That's a proper question. It is
5 leading, but please don't lead the witness, but the objection
6 made is overruled.

7 Please answer.

8 **THE WITNESS:** We believed it was permissible to
9 implement the language without a license from Sun.

10 **BY MR. VAN NEST:**

11 **Q.** And did you have a belief as to whether or not you could
12 use the APIs?

13 **A.** Yes.

14 **Q.** What was that believe based on?

15 **A.** That it was permissible to do so.

16 **Q.** What was your belief in that based on?

17 **A.** Forty years of experience.

18 **Q.** Tell the jury what you mean.

19 **MR. BICKS:** Your Honor, we're going on 40 years of
20 experience. I'm going to object depending on where this is
21 going in terms of time frame.

22 **MR. VAN NEST:** Let me ask another question,
23 Your Honor.

24 **Q.** At the time that Google built Android using the Java APIs,
25 was it your understanding that that was permissible to do as

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1 long as you wrote your own implementing code?

2 **A.** That is correct.

3 **Q.** What was that understanding based on at the time?

4 **A.** Well, business advice, legal advice, many years of
5 experience in the industry.

6 **Q.** Let's leave the legal advice out.

7 What was the many years of experience contributing to this
8 belief?

9 **THE COURT:** The jury will disregard that comment about
10 legal advice. Because --

11 **MR. VAN NEST:** Let's stick -- excuse me.

12 **THE COURT:** -- because I could get into the reasons,
13 but the parties have elected not to get into and tell you what
14 the legal advice was, so we can't make these vague allusions to
15 legal advice. You must disregard the idea that there was legal
16 advice behind what the witness is going to say. I'm not saying
17 the legal advice was bad or good, but you just have to
18 disregard it.

19 However, the other parts of the question are permissible.

20 So please answer as to the other parts of the question,
21 the basis.

22 **THE WITNESS:** Would you like a historical example?

23 **BY MR. VAN NEST:**

24 **Q.** Sure.

25 **A.** Okay. When I was at Sun in the early '90s, I built a

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1 product called WABI which was roughly analogous to what we were
2 doing at Google, and this used the public -- public interfaces
3 for Windows to build an implementation of Windows without the
4 license fee to Windows.

5 **Q.** That was something you did at Sun?

6 **A.** That is correct.

7 **Q.** Now, by then, by 2006/2007 at Google, did you have other
8 experience with APIs that informed your decision?

9 **MR. BICKS:** Again, Your Honor, objection because this
10 witness is not an expert on custom relating to APIs.

11 **THE COURT:** Well, as long as it's his actual -- he's
12 explained -- as long as this is meant to explain what he
13 actually thought at the time as to his good faith or bad faith,
14 it's permissible. So I will overrule that objection, but it
15 has to be cast in terms of what he actually had in mind at the
16 time and not veer off into expert opinion.

17 So to that extent, the objection is overruled.

18 Please answer.

19 **THE WITNESS:** So in the industry, I had seen a number
20 of examples over my service of this kind of thing. So that's
21 why I believed what I did.

22 **BY MR. VAN NEST:**

23 **Q.** Was it a secret that Google was developing Android with
24 Java?

25 **A.** Certainly not.

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1 Q. Was Mr. Schwartz told that you would be continuing to use
2 the Java language in the APIs?

3 MR. BICKS: Again, Your Honor, leading.

4 THE COURT: It is leading. Sustained.

5 Please don't lead the witness on something that is
6 important.

7 BY MR. VAN NEST:

8 Q. Had you and Mr. Schwartz discussed the nature of Google's
9 effort to build the phone?

10 A. Yes. Many times.

11 Q. Okay. And in those discussions, did you have any
12 discussion about either the language or the APIs?

13 A. I told Mr. Schwartz the details of what we were doing as I
14 knew them at the time, which would have included that
15 information.

16 Q. Now, do you have any idea how long it took Google to build
17 Android, Mr. Schmidt?

18 A. If we refer to the timelines, since I got the date wrong
19 last time, we purchased Android in --

20 Q. 2005?

21 A. -- 2005. And it had been in development for a couple of
22 years before. And we released the first version of Android in
23 2009 -- 2008.

24 Q. Actually, November 2007 Google releases Android?

25 A. Yeah. But that one didn't work. We really released the

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1 working version in 2008.

2 Q. Why did it take so long to develop? That's three years.
3 July '05 to '08?

4 A. There is just a tremendous number of pieces to make the
5 magic happen on these smartphones, and we were under a great
6 deal of pressure because the iPhone had come out earlier.

7 Q. Okay. We have on our timeline an announcement, Google
8 releases Android. What announcement was made in November of
9 2007?

10 A. So we announced something called the Open Handset
11 Alliance, and again, our idea was to have as many partners in
12 the ecosystem that would use this, so our goal was to get as
13 many people on this platform as possible, which, of course, we
14 were freely licensed -- licensing. Excuse me.

15 Q. Was the announcement made on behalf of the entire
16 Alliance?

17 A. Yes. And I did it.

18 Q. Can you provide a few examples of members of the Alliance
19 to the jurors?

20 A. Well, pretty much all of the telecommunications companies
21 and pretty much all of the enterprise software companies.

22 Q. At the time you announced Android, did you also announce
23 the nature of licensing for Android to the public?

24 A. Yes. We indicated that Android would be freely licensed.

25 Q. What do you mean by that?

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1 **A.** You did not need to pay a fee to use Android.

2 **Q.** Now, at this time, November of 2007, was Mr. Schwartz
3 still the CEO of Sun?

4 **A.** He was.

5 **Q.** And did he have a popular blog?

6 **A.** He did.

7 **Q.** Was this something you read periodically?

8 **A.** I did.

9 **Q.** Did you understand whether or not it was an official
10 statement of Sun?

11 **A.** I -- I assumed it was his view and also the view of the
12 company.

13 **Q.** Did Mr.--

14 **MR. BICKS:** Objection, Your Honor. It's add-on
15 testimony. It's not responsive.

16 **THE COURT:** Well, it -- even if he doesn't know for
17 sure, it may go to his state of mind, which is an issue in the
18 case, on propriety of the use under Factor 1, so the objection
19 is overruled.

20 **BY MR. VAN NEST:**

21 **Q.** Did Mr. Schwartz publish a blog post concerning Android?

22 **A.** He did.

23 **Q.** Did you read it at the time?

24 **A.** I did.

25 **MR. VAN NEST:** May I approach the witness, Your Honor.

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1 **THE COURT:** Yes.

2 **BY MR. VAN NEST:**

3 **Q.** Would you please take a look at Exhibit TX 2352. Do you
4 recognize that?

5 **A.** I do.

6 **MR. VAN NEST:** I offer TX 2352 into evidence.

7 **MR. BICKS:** I do object to the relevance of it.

8 **THE COURT:** I need to see it then. Is this the blog?

9 **MR. VAN NEST:** It is, Your Honor.

10 **THE COURT:** Objection overruled.

11
12 (Trial Exhibit 2352 received in evidence)

13 **BY MR. VAN NEST:**

14 **Q.** Let's display 2352 to the jurors.

15 Mr. Schmidt, the first paragraph of this makes
16 reference -- he says, "I just wanted to add my voice to the
17 chorus of others from Sun in offering my heartfelt
18 congratulations to Google on the announcement of their new
19 Java/Linux phone platform, Android."

20 What did you understand Mr. Schwartz to be referring to
21 when he said Java/Linux phone platform?

22 **A.** Well, he was referring to Android.

23 **Q.** The second paragraph ends with the statement -- excuse me.
24 Let's go to the first sentence there. "I would also like Sun
25 to be the first platform software company to commit to a

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1 complete developer environment around the platform as we throw
2 Sun's NetBeans Developer Platform for mobile devices behind the
3 effort."

4 Did you know what the NetBeans Developer Platform was?

5 A. I did.

6 Q. What was it?

7 A. It was a set of libraries called JavaBeans which they had
8 built on top of the Java language which they would be putting
9 on Android and they had told us this.

10 Q. Did you consider that a good thing?

11 A. Absolutely.

12 Q. Why?

13 A. It's a good partner.

14 Q. What was your reaction to this blog post?

15 A. This was a great -- a great message of congratulations.

16 Q. He goes on to say further on, "And needless to say, Google
17 and the Open Handset Alliance just strapped another set of
18 rockets to the community's momentum and to the vision defining
19 our opportunity across our and other planets."

20 What opportunity was he referring to there?

21 A. Well --

22 MR. BICKS: Objection, Your Honor.

23 THE COURT: Sustained, but you can ask him what this
24 witness at the time thought in his own head he was referring
25 to. That would be a proper question.

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1 **BY MR. VAN NEST:**

2 **Q.** What did you understand Mr. Schwartz to be referring to,
3 Mr. Schmidt?

4 **A.** So my interpretation of this is Google --

5 **THE COURT:** Not your present interpretation. Back
6 then. If you had one, you can tell us what it was then.

7 **THE WITNESS:** I apologize, Your Honor. I meant to say
8 when I read this, what I interpreted it to mean was Google and
9 Sun are partners at the time and that we're going to grow this
10 ecosystem bigger and bigger and bigger as a result of the Open
11 Handset Alliance and their development work on top of what we
12 were doing. That's how I interpreted it.

13 **BY MR. VAN NEST:**

14 **Q.** Now, following the blog post, did you continue to receive
15 communications from Mr. Schwartz?

16 **A.** I did.

17 **Q.** Did you receive further emails?

18 **A.** I did.

19 **Q.** I'm sorry. I have wrong the exhibit. Can I get 3441,
20 please.

21 **THE COURT:** There is a snafu. I know the heart is
22 singing in the jury box when you heard there is 3,441 documents
23 that you are going to have to review, but if history is any
24 guide, it will be maybe a couple hundred, but it won't be that
25 many. They marked a lot of exhibits, but most of them won't

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1 actually be used. So there still will be several hundred, at
2 least 200, I'm sure.

3 Do we have the document?

4 **MR. VAN NEST:** We don't, but we're looking for it.
5 Let me move on to another exhibit.

6 **Q.** After the Android -- let me back up just a minute.

7 When Android was announced in November of 2007, was part
8 of Android made public?

9 **A.** Well, as I said, our strategy was to be freely licensed so
10 we said that we would make our source code available.

11 **Q.** Could someone wishing to see what APIs were used be able
12 to find that out?

13 **A.** Yes.

14 **Q.** How would they do that?

15 **A.** Well, we published the APIs, we created a cite, many
16 things to make sure people could see what we were doing.

17 **Q.** Could anyone access that cite?

18 **A.** Yes. Worldwide.

19 **Q.** Now, did you continue to meet and talk with Mr. Schwartz
20 after the announcement of Android?

21 **A.** I did.

22 **Q.** May I approach the witness, Your Honor.

23 Take a look at Exhibit TX 3446 and tell me whether you
24 recognize that?

25 **A.** I do.

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1 Q. What is it?

2 A. It's a message from me to Jonathan Schwartz of Sun copying
3 Andy Rubin of Google.

4 MR. VAN NEST: I would offer TX 3466 in evidence.

5 MR. BICKS: No objection.

6 THE COURT: I'm sorry. 3466 or 3446?

7 MR. VAN NEST: 3466.

8 THE COURT: All right. Received in evidence. Thank
9 you.

10 (Trial Exhibit 3466 received in evidence)

11 BY MR. VAN NEST:

12 Q. Let's refer to -- the first line refers to, "Nice to see
13 you this morning. As a follow-up to our conversation, I ask
14 for details on our Android licensing terms. Please review. We
15 are happy to have our teams meet."

16 Had you met with Mr. Schwartz that day?

17 A. I believe this is when I met with him at his office or
18 cafeteria in the morning at Sun.

19 Q. All right. And what was the purpose for that meeting?

20 A. A catch-up.

21 Q. You were a customer of Sun's at that time?

22 A. Just business -- good friends. Business conversation.

23 Q. And did the two of you discuss Android during the meeting?

24 A. We did.

25 Q. And what discussion did the two of you have about Android?

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1 **A.** The key question is how do we go forward so that they
2 could remain part of the community. We could do the right
3 thing; everyone would be happy.

4 **Q.** And did he have some questions for you about Android?

5 **A.** Yes.

6 As I recall, he was still slightly confused in his
7 questions to me about what we were exactly doing. And so I
8 clarified it in a follow-up email.

9 **Q.** And the email makes a reference to, in point 1, "Our
10 license is Apache v2." Do you know what that is?

11 **A.** Yes.

12 **Q.** What is Apache v2?

13 **A.** Apache is the name of a particularly liberal license for
14 use of software. And this paragraph defines what we do with
15 that license.

16 **Q.** And why were you providing that information to
17 Mr. Schwartz?

18 **A.** They were not using the same license.

19 **Q.** You go on in point 2 to say --

20 **THE COURT:** That's unclear. What do you mean "they"?

21 **THE WITNESS:** Sorry.

22 Sun had a different license model, and they were not using
23 Apache v2.

24 **THE COURT:** Thank you.

25

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1 **BY MR. VAN NEST**

2 **Q.** You go on to say, in point 2, "As a result, Sun will be
3 able to take Android and do whatever you like to it, subject to
4 the license."

5 What were you referring to there?

6 **A.** Could we read the second --

7 **Q.** Sure.

8 **A.** -- sentence as well?

9 **Q.** Yes.

10 **A.** "This should allow you to, for example, add Java code or
11 anything else on top of Android and make it available."

12 So what I'm telling him in my email here is they can take
13 our version of Android and do whatever they want. It's
14 completely free for their use in any way they wish.

15 **Q.** Did he indicate to you that he was interested in working
16 with Android?

17 **A.** Yes. He had said he would like to discuss that.

18 **Q.** All right. Now, I have 3441.

19 **MR. VAN NEST:** May I approach the witness, Your Honor?

20 **THE COURT:** You may.

21 **BY MR. VAN NEST**

22 **Q.** Do you recognize 3441?

23 **A.** I do.

24 **Q.** What is it?

25 **A.** This is a message from Jonathan to me; and then from me to

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Jonathan; and then back from Jonathan to me. So it's, let's see. Him to me; me to him; him back to me, bottom to top.

MR. VAN NEST: Your Honor, I would offer 3441 in evidence.

MR. BICKS: No objection.

THE COURT: Received.

(Trial Exhibit 3441 received in evidence.)

BY MR. VAN NEST

Q. All right. This is a little bit earlier than the last one, Mr. Schmidt. We found it now.

The email at the bottom, is that the first email in the chain?

A. That's correct.

Q. Right. And Mr. Schwartz says to you, "Let us know" -- it's re Android.

"Let us know how we can help support your announcements next week. We're happy to do so."

What announcements was he referring to?

A. This is the open handset announcement of Android.

Q. And did you respond?

A. I said, "Thanks, Jonathan. I'll review right now. The software development kit is supposed to release in Early Look on Monday."

Q. What's the software development kit?

A. Software development kit is the first thing a programmer

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1 tests when they have a new offer to them.

2 So try this; see if you like it; get excited about it or
3 decide you don't like it.

4 **Q.** Does the SDK disclose the APIs that are available on
5 Android?

6 **A.** Yes. As part of the software development kit, the APIs
7 are part of that.

8 **Q.** And, again, can anybody access that?

9 **A.** It was a public release.

10 **Q.** Did you have further email correspondence with
11 Mr. Schmidt -- with Mr. Schwartz? Excuse me.

12 **A.** I.

13 **Q.** You're Mr. Schmidt.

14 **MR. VAN NEST:** May I approach, Your Honor?

15 **THE COURT:** Yes.

16 **BY MR. VAN NEST**

17 **Q.** This is TX 5987. Do you recognize that?

18 **A.** I do.

19 **Q.** What is it?

20 **A.** It's a message, again, from Jonathan to me; me to
21 Jonathan; Jonathan back.

22 **MR. VAN NEST:** I'd move 5987 into evidence, Your
23 Honor.

24 **MR. BICKS:** No objection.

25 **THE COURT:** Thank you. Received.

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(Trial Exhibit 5987 received in evidence.)

BY MR. VAN NEST

Q. All right. Your portion of the email says, the one on the bottom, "Thanks, Jonathan. Did you get the email I sent about the details on Android licensing?"

What were you referring to there?

A. Well, from the bottom up, he writes to me, "On your deal, don't hesitate. Let me know if I can be supportive, from Sun."

I'm responding saying, "Did you read the details that I sent you?" I sent it too. Here's the email. And then his response is above.

Q. He says, "At some point I'd love to get the teams in a room to talk about Java certifying the platform and having Sun ship it as such."

Did you understand what he was referring to there?

A. I did.

Q. What was he referring to?

A. Because our implementation did not have the trademark license and had not been certified, because we didn't follow that path, he is -- he is saying he would like us to do that at some point in the future. And he says that that would be beneficial; we would bring 10,000 apps to it.

Q. Now, this email is dated April of 2008?

A. That's correct.

Q. Do you see that?

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1 When did the first Android-based smartphone come out?

2 We're showing October on our timeline.

3 **A.** That is correct.

4 **Q.** And were there subsequent releases from -- strike that.

5 Who released that phone?

6 **A.** Well, we had a set of partners. But the first one was the
7 HTC company.

8 **Q.** Who is HTC?

9 **A.** The Taiwanese hardware manufacturer.

10 **Q.** Did other companies begin following to release Android
11 phones?

12 **A.** They did.

13 **Q.** Did you continue talking with Mr. Schwartz throughout this
14 period?

15 **A.** I did.

16 **Q.** Was he made aware that these phones were released and
17 shipping?

18 **A.** Yes.

19 **Q.** Okay. Now, in any of the meetings and conversations you
20 had with Mr. Schwartz, did he ever express disapproval about
21 what you were doing in Android?

22 **A.** He did not.

23 **Q.** In any of those meetings, did Mr. Schwartz suggest that it
24 was wrong or unfair for Android to use the Java APIs?

25 **A.** He did not.

SCHMIDT - DIRECT / VAN NEST

1 Q. Did he express disapproval, in any way, of Android's use
2 of the Java APIs?

3 A. He did not.

4 Q. Did he ever tell you, in any of your meetings, discussions
5 or emails, that Google needed a license from Sun to use the
6 Java APIs?

7 A. He did not.

8 Q. Based on your discussions with Mr. Schwartz, and his
9 comments to you, did you feel you had a good understanding of
10 what was permissible from Sun's perspective?

11 A. I did.

12 Q. And what was that?

13 A. That our approach was appropriate and permitted.

14 Q. And what understanding, if any, did you have at the time
15 as to whether or not your use of the APIs in Android was
16 consistent with Sun's business practices?

17 A. Well, because of my own history, I -- I had a long history
18 with this, and I was quite sure this was all permissible.

19 Q. Why?

20 A. Because I set up the original deal 20 years earlier, and I
21 participated with them for such a long time.

22 Q. Okay. And when you say you "set up the original deal,"
23 would you tell our jurors what you mean.

24 A. This was when we did the original Java announcements.
25 These were the terms. So I did them.

1 **THE COURT:** It's unclear whether you're talking about
2 Google or Sun.

3 **THE WITNESS:** Oh, I apologize.

4 **THE COURT:** Please clarify.

5 **THE WITNESS:** In 1995, when we announced Java -- which
6 I did -- these were the terms that I set. So I knew them quite
7 well.

8 **BY MR. VAN NEST**

9 **Q.** And by these are the terms we set, can you tell the jury
10 what you mean?

11 **A.** To summarize, that if you have an implementation, it has
12 to be licensed and you have to pay for it; but that you can use
13 the published interfaces and build your own implementation.

14 **Q.** Did you rely on that knowledge in going forward in
15 building Android?

16 **A.** I did. Or we did.

17 **MR. VAN NEST:** Pass the witness, Your Honor.

18 **THE COURT:** All right. Thank you.

19 Cross-examination.

20 Before you get started, Mr. Bicks...

21 My plan is to push all the way through to 1:00 o'clock.

22 If anyone in the jury box needs a break we, of course, will
23 take one. So if we get to that point, raise your hand and just
24 let me know. Are we okay for now, or do we need to break now?

25 Great. We will push on. If you need one, raise your hand

SCHMIDT - CROSS / BICKS

1 at the appropriate time.

2 Mr. Bicks, the floor is yours.

3 **MR. BICKS:** Thank you, Your Honor.

4 **CROSS-EXAMINATION**

5 **BY MR. BICKS**

6 **Q.** Good afternoon, Mr. Schmidt. Let's just start with some
7 basic things on timing.

8 When did you leave Sun, sir?

9 **A.** I left Sun in June of 1997.

10 **Q.** All right. So I'll put a little sticker there next to the
11 year 1997.

12 You left Sun in 1997?

13 **A.** That is correct.

14 **Q.** All right. And do you know -- when you were talking about
15 licensing practices you were talking about them before 1997;
16 right?

17 **A.** With respect to my own involvement, yes.

18 **Q.** Right. So when we're talking about licensing practices
19 after 1997, at Sun, you were not there; correct?

20 **A.** That is correct.

21 **Q.** And when you mentioned on your direct testimony -- I think
22 you mentioned to the jury a book that had the language and
23 specifications in that. You did; right?

24 **A.** I did.

25 **Q.** And did you mention to the jury, in this book -- that in

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1 the book is actually a license? Did you say that on direct?

2 **A.** I was not asked that.

3 **Q.** Is there a license in this book? Do you know, sir?

4 **A.** I do not know.

5 **Q.** You didn't look at this before you came to testify?

6 **A.** I have not looked at that book in 15 years.

7 **Q.** Well, let me show you the book. It's TX 980.

8 **MR. BICKS:** And can I hand that up?

9 **THE COURT:** Yes, you may. 980. Do you want to put it
10 in evidence? Any objection?

11 **MR. VAN NEST:** Objection, Your Honor. This was not
12 disclosed as an exhibit for cross.

13 **MR. BICKS:** Well, he mentioned it on direct, Your
14 Honor. It's not mentioned --

15 **MR. VAN NEST:** --

16 (Indecipherable simultaneous colloquy.)

17 **THE COURT:** Well, this is the book you mentioned.
18 There was a question on direct. I'm going to let -- if the
19 witness says it's the same book, I'm going to let him use it.

20 **MR. BICKS:** All right.

21 **THE COURT:** Did you want to move it, or not?

22 **MR. BICKS:** I'm happy to move it, Your Honor.

23 **THE COURT:** Any objection to 980?

24 **MR. VAN NEST:** My objection stands, Your Honor.

25 **THE COURT:** Overruled. Number 980 is in evidence.

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(Trial Exhibit 980 received in evidence.)

BY MR. BICKS

Q. Take a look at 980.

You mentioned a book. Tell me if this was the book.

A. It is.

Q. And then I asked you about a license. I put a little orange sticky flag there to help us find it. Do you see where it says it there, "Restricted rights legend"?

MR. BICKS: Is there a way to publish the book?

Can you blow this up.

(Document displayed.)

BY MR. BICKS

Q. Do you see where I'm talking about, sir, and I'm highlighting, "pass all test suites relating to the specification"?

A. I see that.

Q. Does this help you remember that there's a license in the book?

A. Yes, there's a license.

Q. All right. Now, I think I also heard you say on direct that you were under a great deal of pressure because Apple came out.

Did I hear you say that?

A. That's correct.

Q. And tell me when Apple came out.

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1 **A.** Apple would have released their iPhone in roughly 2007.

2 **Q.** And do you remember when your corporation decided to take
3 the design of the API packages that's at issue in this case?

4 **A.** No. But it would have been earlier.

5 **Q.** Do you know when it was?

6 **A.** You'd have to refresh my exact memory.

7 **Q.** So you don't recall specifically when it was, do you?

8 **A.** Well, you're asking me for a precise date.

9 **Q.** I am.

10 **A.** It would have been during Google-Sun discussions.

11 **Q.** Do you remember a company called Noser?

12 **A.** I do not.

13 **Q.** Do you know when your company signed a contract with Noser
14 to work on those APIs?

15 **A.** I do not.

16 **Q.** Now, I do want to ask you about, you asked me to refresh
17 your memory.

18 You had a very good recollection of some conversations you
19 had with Mr. Schwartz. Tell me, again, when was this -- you
20 said in the lunchroom. Or where was that?

21 **A.** Again, it was ten years ago. So I had -- I recall a
22 meeting where I went to the Sun cafeteria in Menlo Park and sat
23 around and talked to Jonathan for a while.

24 **Q.** And, I'm sorry. Tell me, again, when the lunch meeting
25 was.

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1 **A.** Again, we'd have to place it on the -- we'd have to go
2 back to the direct.

3 **Q.** To the what?

4 **A.** We'd have to go back to when I was asked about it by
5 Mr. Van Nest.

6 **Q.** So as you're sitting here, if I want to take a yellow
7 sticky and put it over there --

8 **THE COURT:** Wait a second. Would one of those
9 documents you looked at earlier -- is that what you're trying
10 to tell us?

11 **THE WITNESS:** Yes.

12 **THE COURT:** Take a moment. Look at one of those
13 documents and see if you can tell us what the date is.

14 **THE WITNESS:** "Jonathan, nice to see you this
15 morning." March 31st, 2008. That would be my best
16 recollection.

17 **BY MR. BICKS**

18 **Q.** So do you have any notes or an email or a letter that says
19 what happened at that lunch meeting?

20 **A.** As far as I know, this is the only -- only recollection.
21 There may be others.

22 **Q.** And point out, in that memo that you have there, point out
23 where it says that you told him you were going to take the
24 design of those API packages.

25 **A.** It's implied by my -- by my message.

SCHMIDT - CROSS / BICKS

1 **MR. BICKS:** So can we just publish that exhibit for a
2 moment?

3 **THE WITNESS:** I'm not sure I understood your question.

4 **THE COURT:** Well, which Exhibit are you looking at?

5 **THE WITNESS:** This is 3466.

6 **THE COURT:** All right. Let's put that on the screen
7 for the jury.

8 (Document displayed.)

9 **BY MR. BICKS**

10 **Q.** And tell me in here where there's reference to these API
11 packages.

12 **A.** Okay. So our license is Apache v2. That covers all of
13 the work we did, including the implementations that we did of
14 the Java API.

15 **Q.** And are you familiar, sir, with the details of the Apache
16 license?

17 **A.** I read it a long time ago.

18 **Q.** Okay. And you're not the expert on the Apache license at
19 your company; right?

20 **A.** I am not.

21 **Q.** All right. And did I hear you say on direct that --
22 looking at this schedule, that this first Google release of
23 Android, that was -- did you say that was a flop?

24 **A.** No, I said it didn't work. It was a software development
25 kit.

SCHMIDT - CROSS / BICKS

1 Q. You said it didn't work?

2 A. Yeah. That was a euphemism for you couldn't build a phone
3 from it.

4 Q. Oh. And was that -- the software development kit, was
5 that the one that Mr. Schwartz was talking about in his blog?

6 A. Yes.

7 Q. As a matter of fact, the software development kit came out
8 after the blog; right?

9 A. I'll have -- again, I'll have to see the time line.

10 Q. Yeah. November 7th was the blog. The software kit came
11 out a week later. Does that help your memory?

12 A. Yeah, but they were well aware of this SDK being in
13 development.

14 Q. Just so we're clear, sir, the software development kit was
15 announced after the blog; right?

16 A. I don't think that's true, because we would have in the
17 OHA mentioned that we were releasing SDK.

18 Q. Are you sure, sir? I will get out documents. I think
19 both sides agree that software development kit --

20 THE COURT: Wait, wait, wait. No. We don't have the
21 lawyers testify. You just get to ask questions.

22 THE WITNESS: I would need to see the exact sequence.
23 From my perspective, they were coterminous.

24 BY MR. BICKS

25 Q. And this HTC phone that came out, your first phone, was

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1 that a smartphone?

2 A. Yes.

3 Q. And it was a smartphone because why?

4 A. It had a powerful screen and a good processor. And it was
5 connectible to the Internet.

6 Q. It also had instant messaging and things of that nature on
7 it; right?

8 A. I don't remember instant messaging. The --

9 Q. Uhm -- but it was a smartphone; right?

10 A. Yes, it was a smartphone.

11 Q. Uh-huh. And BlackBerry, do you still have a BlackBerry?

12 A. No.

13 Q. You used to; right?

14 A. I did.

15 Q. And is BlackBerry a smartphone?

16 A. Uhm, today, yes.

17 Q. Do you know who the first licensee to BlackBerry was?

18 A. Of what?

19 Q. Of Java.

20 A. First licensee of Java to --

21 Q. Did you know that Sun licensed Java to RIM for BlackBerry?

22 Did you know that?

23 A. No.

24 Q. And today is Android in BlackBerry?

25 A. Today I believe BlackBerry uses Android as its base

SCHMIDT - CROSS / BICKS

1 operating system.

2 Q. And you're also on the Board of Apple? You were at one
3 point; right?

4 A. I was. I am no longer.

5 Q. Were you at Apple when they came out with the iPhone?

6 A. I was.

7 Q. When the iPhone came out, did it use the Java APIs?

8 A. To my knowledge, no.

9 Q. So it came out and got on the market as a smart phone.

10 And it didn't use the Java APIs; correct?

11 A. That is correct.

12 Q. Now, one thing we do know is that you, as CEO, do a lot of
13 public speaking for Google; correct? When you were the CEO.

14 A. Yes.

15 Q. And your goal in those speeches was to be truthful, was it
16 not?

17 A. Of course.

18 Q. And do you recall giving a speech at the Carnegie
19 Endowment for International Peace event, around February 6,
20 2007, where you talked about the importance of intellectual
21 property to your company?

22 A. I do not. I'm sure you'll refresh me.

23 MR. BICKS: Yeah. Your Honor, I would like permission
24 to play as a party admission video 710, which is Trial Exhibit
25 886.

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1 **THE COURT:** Any objection?

2 **MR. VAN NEST:** What's the Exhibit Number?

3 **MR. BICKS:** Trial Exhibit 886.1.

4 **MR. VAN NEST:** No objection, Your Honor.

5 **THE COURT:** 886.1?

6 **MR. BICKS:** Yes, Your Honor.

7 **THE COURT:** .1 is received in evidence.

8 (Trial Exhibit 886.1 received in evidence.)

9 **THE COURT:** You may play it.

10 **MR. BICKS:** Thank you.

11 (Video played)

12 **BY MR. BICKS**

13 **Q.** And that were your views at the time and, I presume,
14 today?

15 **A.** They are.

16 **Q.** And in that recording we just heard, you said
17 "Intellectual property rights are fundamental to how Google
18 operates."

19 Is it true then and true now?

20 **A.** It is.

21 **Q.** And you say in that video that you operate best on a set
22 of proprietary things which you view yourself as intellectual
23 property.

24 Was that true then and true now?

25 **A.** It is.

SCHMIDT - CROSS / BICKS

1 **Q.** And you say in that speech that the company wouldn't exist
2 without basic intellectual property rights. True then and true
3 now?

4 **A.** That is correct.

5 **Q.** And those intellectual property rights, those include
6 copyrights; correct?

7 **A.** Yes.

8 **Q.** Uh-huh.

9 And you also certify your company's annual reports, do you
10 not, sir?

11 **A.** I do.

12 **Q.** And, do you know, in those annual reports you intend to be
13 accurate, do you not?

14 **A.** Yes.

15 **Q.** And those are things that the investment community,
16 shareholders and the world rely on as truthful?

17 **A.** Yes, they do.

18 **Q.** And do you know in your annual reports that you tell the
19 world that if somebody takes your intellectual property and
20 it's unauthorized, that it can materially harm your company?
21 You say that, don't you?

22 **A.** I'm assuming we do, yes.

23 **MR. BICKS:** May I approach, Your Honor?

24 **THE COURT:** Yes.

25 **MR. BICKS:** This is Exhibit 3211. It's an annual

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1 report.

2 **BY MR. BICKS**

3 **Q.** You've seen it before; right?

4 **A.** Yes.

5 **MR. BICKS:** I tender this in evidence.

6 **THE COURT:** 3211. Any objection?

7 **MR. VAN NEST:** No objection, Your Honor.

8 **THE COURT:** In evidence.

9 (Trial Exhibit 3211 received in evidence.)

10 **MR. BICKS:** Can we go to page 129.

11 (Document displayed.)

12 **BY MR. BICKS**

13 **Q.** That's your signature at the end; correct?

14 **A.** It is.

15 **Q.** Date is March 30th, 2005.

16 There's some legalese up at the top, that you're
17 certifying the truth; correct?

18 **A.** I am.

19 **Q.** And if we go to this document, at page 55, you've got a
20 statement about your intellectual property rights.

21 Do you see that?

22 **A.** I do.

23 **Q.** And it says at the top, in black, that they are valuable;
24 true?

25 **A.** Yes.

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1 **Q.** And your inability to protect them could reduce the value
2 of your products, services and brand.

3 That is true; correct?

4 **A.** Yes.

5 **Q.** And?

6 **MR. BICKS:** And if we could go down here, Trudy, and
7 scroll down.

8 (Document displayed.)

9 **BY MR. BICKS**

10 **Q.** And you say here at the top, "Any increase in the
11 unauthorized use..."

12 **MR. BICKS:** It's the end of that top paragraph, Trudy.

13 **BY MR. BICKS**

14 **Q.** Do you see that, sir?

15 **A.** I do.

16 **Q.** That's truthful, isn't it?

17 **A.** Yes, it is.

18 **Q.** Any increase in the unauthorized use of your intellectual
19 property could make it more expensive to do business and harm
20 your operating results; correct?

21 **A.** Yes.

22 **Q.** And you know here today, in this trial, we're here to talk
23 about the use of intellectual property that is the property of
24 Oracle. You know that?

25 **A.** We are certainly talking about intellectual property that

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1 is the property of Oracle, yes.

2 **Q.** Right.

3 And you know that the Court has told this jury that the
4 use of declaring code and the structure sequence and
5 organization of 37 API packages violates the copyright laws in
6 less fair use? You know that?

7 **MR. VAN NEST:** Objection, Your Honor. He has not been
8 present for anything said to the jury.

9 **MR. BICKS:** Well --

10 **THE COURT:** That's a good point.

11 **MR. VAN NEST:** Mr. Schmidt has been out in the hall.

12 **THE COURT:** That's argumentative.

13 **BY MR. BICKS**

14 **Q.** All right. You're aware why you're here today; right?

15 **A.** I am.

16 **Q.** And you know you're here relating to the use of the design
17 of 37 API packages; right?

18 **A.** I am.

19 **Q.** All right. And you talked about some discussions that you
20 had with Mr. Schwartz and others back in the '05-'06 time
21 period; right?

22 **A.** Yes.

23 **Q.** And one thing we can agree on is you never got a written
24 license, or signed one, to use those API packages; correct?

25 **A.** That is correct.

SCHMIDT - CROSS / BICKS

1 Q. And we know, sir, that you also had discussions before
2 this lawsuit got filed with executives at Oracle; correct?

3 A. The company did. I did not.

4 Q. You don't remember that you met with Mr. Ellison in
5 about --

6 A. No.

7 Q. -- March of 2010?

8 A. I thought you were referring to this round. Yes, I met
9 with Larry Ellison.

10 Q. So one thing we can be sure of is that you knew, certainly
11 no later than August 2010, when this case got filed, that
12 Oracle believed that what you were doing was a violation of the
13 copyright law. You knew that; right?

14 A. I was certainly aware of Larry's view, yes.

15 Q. And did you take any steps, after this lawsuit got filed
16 in August 2010, to take out of the mobile devices on the market
17 any code or anything relating to those API packages?

18 A. I'm not aware of any in that time period.

19 Q. Now, you've given certain speeches and discussions about
20 the success of Android; right?

21 A. I have.

22 Q. And when we talk about the number of mobile phones in the
23 marketplace, that's something you speak about from time to
24 time; true?

25 A. I do.

SCHMIDT - CROSS / BICKS

1 **Q.** And in about August 5th, 2010, a week before this lawsuit
2 got filed, you told a bunch of folks that there were 200,000
3 device activations every day.

4 Does that sound about right to you?

5 **A.** It's possible, sure.

6 **Q.** So there's no question about it, let me show you 5167.

7 You recognize this. It's got your name on it because you
8 sent it out; right?

9 **A.** I do.

10 **MR. BICKS:** So I move it into evidence.

11 **MR. VAN NEST:** Sorry, what's the exhibit number?

12 **MR. BICKS:** 5167.

13 **THE COURT:** Any objection?

14 **MR. VAN NEST:** Give me a moment, Your Honor.

15 No objection.

16 **THE COURT:** Thank you. Received.

17 (Trial Exhibit 5167 received in evidence.)

18 (Document displayed.)

19 **MR. BICKS:** Can we please blow up "The rapid
20 adoption," Trudy, on 5167.

21 **BY MR. BICKS**

22 **Q.** I was asking about the number of phones that were
23 activated in August of 2010. And this says 200,000 activation
24 devices per day, does it not?

25 **A.** That's correct.

SCHMIDT - CROSS / BICKS

1 Q. And it says that you were "well past escape velocity at
2 every level at that time." Is that accurate?

3 A. That's correct.

4 Q. What's "escape velocity" mean?

5 A. It's a term we're using to talk about the likely success
6 of our product line.

7 Q. Things were looking roseey?

8 A. Very, very optimistic.

9 Q. And if we roll forward, do you know who Henrique de Castro
10 is?

11 A. Sorry, Henrique de Castro?

12 Q. Yeah.

13 A. Can you refresh my memory?

14 Q. He was the president of the mobile platform at your
15 company. Does that ring a bell?

16 A. Henrique de Castro?

17 Q. Henrique de Castro.

18 A. Oh, yes. Different pronunciation. Yes, I do know who he
19 is.

20 MR. BICKS: All right. 5147, the parties have already
21 agreed that this is in evidence. I formally move it in. We
22 had a stipulation.

23 THE COURT: Received in evidence unless I hear an
24 objection.

25 (Trial Exhibit 5147 received in evidence.)

SCHMIDT - CROSS / BICKS

1 **THE WITNESS:** Yes. It's Henrique.

2 **MR. VAN NEST:** No objection, Your Honor.

3 **THE COURT:** Thank you.

4 **BY MR. BICKS**

5 **Q.** You know who he is; right?

6 **A.** I do.

7 **Q.** And he was president of -- important part of the platform
8 business; right? Android. Did you know that?

9 **A.** I believe -- I thought he was in a different job. He
10 certainly was an executive in this area at the time.

11 **Q.** And you remember him --Let's go to the back here.

12 This was a memo he wrote about mobile metrics. And he
13 says in the bottom, "We see 550,000 Android activations every
14 day. That's more than the number of babies who are born every
15 day."

16 Is that accurate?

17 **A.** I can only speak on the Android side, but I'm sure that's
18 correct.

19 (Laughter)

20 **Q.** You would expect Henrique de Castro to know the numbers;
21 right?

22 **A.** I'm assuming his words are correct.

23 **Q.** You used the word "escape velocity." Is this, kind of,
24 the escape velocity that you were talking about?

25 **A.** It is.

SCHMIDT - CROSS / BICKS

1 Q. And if we roll forward -- so this is 2011. He's saying
2 550,000 per day.

3 You said, in about 2013, that you were at 1.5 million
4 activations per day. Does that sound about right?

5 A. That's correct.

6 Q. And each and every one of those activations has the design
7 of those 37 packages in it; right? Every one of those phones.

8 A. Yes.

9 Q. So what are the activations today then?

10 A. I don't know the exact number.

11 Q. Give us a ballpark as the -- you explained the inverted
12 thing, the alphabet. Give us the ballpark as -- at what it
13 would be today.

14 A. It's certainly more than a million a day, would be my
15 estimate.

16 Q. Certainly more than a million a day?

17 A. Yes.

18 Q. So it was 1.5 million in 2013. And you think it went
19 down?

20 A. No. I said it's -- it's certainly more. It's hard to
21 estimate because activations measure new customers. So I don't
22 know the exact number. But it's certainly -- it's certainly
23 more than a million.

24 Q. Uh-huh. And I want to come back to the question of
25 intellectual property because you said in your annual report

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1 that if somebody takes your intellectual property
2 unauthorized -- and that includes copyright; correct?

3 **A.** Yes.

4 **Q.** -- that there can be material harm to your company;
5 correct?

6 **A.** Yes.

7 **Q.** And do you know and did you look at, before you came here
8 today, contracts that your company has that relates to your
9 APIs? Did you look at any of those?

10 **A.** Not recently.

11 **Q.** Uh-huh.

12 **MR. BICKS:** Can I have 5250.

13 **BY MR. BICKS**

14 **Q.** Do you know that when it comes to your APIs, that you have
15 contracts which say that they're proprietary; say that they've
16 got copyrights; and say don't use them for commercial reasons?

17 Do you know that?

18 **A.** I need to see them.

19 **Q.** It's 5250.

20 Do you see that, sir?

21 **A.** I do.

22 **Q.** It says "Google AdWords" at the top.

23 **A.** I do.

24 **MR. BICKS:** And I'd move this into evidence.

25 **MR. VAN NEST:** Objection, Your Honor. Lacks

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1 foundation. This is not a document that came from Google.

2 **MR. BICKS:** It's got your Google logo on the top.

3 **THE COURT:** Do you know what this document is?

4 **THE WITNESS:** Uhm, okay. It appears -- I mean, I can
5 tell you what I think it is.

6 **THE COURT:** First of all, have you seen this document
7 before?

8 **THE WITNESS:** I have not.

9 **THE COURT:** All right. Nevertheless, do you have a
10 solid basis on which to give us an estimate of what it is?

11 **THE WITNESS:** So, Google has an advertising product --
12 completely different from any of the things we are talking
13 about now -- that has an interface that allows you to use it to
14 get ads. And this is the license that allows you to use that.
15 AdWords API data.

16 **THE COURT:** Is the document prepared by Google?

17 **THE WITNESS:** This would have been -- this is a
18 website document that was written by Google business people and
19 lawyers some time ago.

20 **THE COURT:** All right. That's good enough. 5250 is
21 received in evidence.

22 (Trial Exhibit 5250 received in evidence.)

23 **BY MR. BICKS**

24 **Q.** So I'm looking up at the top there, the "AdWords API." Do
25 you see this, sir?

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1 **A.** I do.

2 **Q.** And you know what an API is; right? What does that stand
3 for?

4 **A.** API stands for applications programmer interface.

5 **Q.** Uh-huh.

6 And you see in the highlighted passage, the second
7 paragraph with the lines there, that there's some language I
8 want to ask you about. Do you see that?

9 **A.** I do.

10 **Q.** And it says here that the AdWords API and AdWords
11 specifications -- do you see those words?

12 **A.** I do.

13 **Q.** And it says those are the intellectual property and
14 proprietary information of Google. Do you see that?

15 **A.** I do.

16 **Q.** And you do expect people with these contracts to honor
17 them, do you not?

18 **A.** We do.

19 **Q.** And it says here that, "Your right to use, copy and retain
20 your copy of the AdWords API and the AdWords API specifications
21 is contingent on your full compliance with this agreement."
22 Right?

23 **A.** I do.

24 **Q.** It does; right?

25 **A.** Uh-huh.

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1 Q. And you consider these to be the intellectual property of
2 your company; right?

3 A. Well, they're one of a very large collection, yes.

4 Q. One of a very large collection.

5 This isn't actually the only agreement where you treat
6 APIs as the intellectual property of your company; right?

7 A. There are many, many different kinds of APIs. This is the
8 AdWords API.

9 Q. Uh-huh. And let me show you 5121, which is another
10 contract involving APIs. Do you see that?

11 A. I do.

12 Q. You're familiar with this; right? One of your company's
13 contracts.

14 A. This is not a contract.

15 Q. Well, it's a terms and conditions; right?

16 A. Again, may I explain what this is?

17 Q. Absolutely.

18 A. Okay. So we built a set of services that programmers who
19 we don't normally deal with can use. And we, for business
20 reasons, had restrictions on the things that they could do.

21 When you would build that service, by using that service
22 you were bound by this document.

23 Q. Yeah. So I said it was a contract. You seem to call it
24 something else. What is it? Is the contract a license? How
25 would you describe it?

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1 **A.** It's essentially an automatic license.

2 **Q.** An automatic license. Whatever we call it, you expect
3 people to follow it; right?

4 **A.** We do.

5 **MR. BICKS:** So I would move this into evidence, Your
6 Honor.

7 **MR. VAN NEST:** No objection, Your Honor.

8 **THE COURT:** Received in evidence.

9 (Trial Exhibit 5121 received in evidence.)

10 (Document displayed.)

11 **BY MR. BICKS**

12 **Q.** 5121. This is the terms and conditions. It says,
13 "Personal and legitimate uses only."

14 Do you see that?

15 **A.** Yes.

16 **Q.** And it says there that, "The Google Web APIs service is
17 made available to you for your personal, non-commercial use
18 only (at home or at work)." True?

19 **A.** Yes.

20 It would be helpful if I explained the difference between
21 an API and a Web service.

22 **Q.** You can do that in a moment.

23 **A.** Okay.

24 **Q.** But bear with me.

25 What we're talking about here, just so we're clear, is

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1 this is the terms and conditions for Google's Web API service;
2 correct?

3 A. That is correct.

4 Q. All right. And what you say here is only use it at home;
5 don't use it for commercial reasons. Right?

6 A. That's correct.

7 Q. And there's no question in this case that when you have
8 Oracle's API packages in the -- and it's billions of phones
9 that have been activated, right, in the history of Android?

10 A. Yes.

11 Q. When you have in those billions of phones those -- the
12 design of those API packages, that's for commercial reasons;
13 right?

14 A. Uhm, we don't have -- I'm sorry, would you ask your
15 question precisely again.

16 Q. You're doing this because you're a for-profit company.
17 And you're highly profitable with Android; right? In fact, you
18 said that in shareholder statements.

19 A. We freely license Android. And we make our money on
20 Search and other applications on top of Android as well as the
21 iPhone.

22 Q. Right. You make your money on advertising search, on top
23 of Android; right?

24 A. And on other platforms, yes.

25 Q. Right. And that's profit-making activity; right?

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1 **A.** Yes.

2 **Q.** In fact, you've said -- and these are your words; not
3 mine -- "hugely profitable"; right?

4 **A.** We are -- yes. Yes.

5 **Q.** All right. And back to what I was asking you about here
6 is, this is your API service contract. I want to go to the
7 intellectual property --

8 **A.** May --

9 **Q.** -- section. And I want to ask you about that.

10 **THE COURT:** What are you trying to say?

11 **THE WITNESS:** I don't know what the protocol here is,
12 but this is about a service we provide, not an API. There is a
13 difference.

14 **THE COURT:** You said he can explain that at some
15 point. You don't have to, but if you're going to get around to
16 it, let him explain.

17 **BY MR. BICKS**

18 **Q.** Well, but you've got contracts where you treat your APIs
19 as proprietary, do you not?

20 **A.** You'd have to show me such a contract.

21 **Q.** Are you telling us here today that you do not treat your
22 APIs at Google as proprietary to your company?

23 **A.** There are millions of APIs. So you have to ask on a
24 per-API basis.

25 **Q.** Well, you tell me which ones, because I don't know all

1 your APIs. You tell me which ones, of all these millions of
2 APIs, that you do treat as proprietary.

3 **A.** Well, I am not aware of ones that we treat as proprietary
4 in the way you're asking your question.

5 We treat our implementations, which is what I was
6 referring to earlier, as very proprietary.

7 And if I could just say that there's a difference between
8 the service and the API. And these documents that you've
9 handed me are about constraints on the use of the service,
10 because people could use too much of it.

11 It's a completely different question.

12 **Q.** So your testimony here today is that you give away your
13 APIs and any design or structure, sequence and organization of
14 those APIs, that you give them away and they're not proprietary
15 to your company?

16 **A.** As a general rule. Again, there may be some exceptions --
17 our view is that the APIs are not what is proprietary. It's
18 the implementation that's proprietary.

19 **Q.** Uh-huh.

20 Well, let's go to the section of this agreement that was
21 up there, that talks about/describes your API specifications.
22 This is 5121.

23 And you see the intellectual property definition here?

24 **A.** Yes, I do.

25 **Q.** Yeah. And you see where it says, "You agree not to

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1 remove, obscure, or alter Google's copyright notice or other
2 proprietary notice affixed to or contained within Google Web
3 APIs"?

4 A. Yes.

5 Q. Did I read that correctly?

6 A. Uh-huh.

7 Q. I did; right?

8 A. Yes.

9 Q. Okay. Now --

10 A. Again, as I previously testified, this is about the Web
11 service.

12 Q. Now, when we talk about Sun and the time period after you
13 left, you are not here today suggesting you're familiar with
14 Sun's licensing terms for Standard Edition, SE and ME after you
15 left; right?

16 A. I was briefed on them, but I'm not an expert.

17 Q. All right. And you do agree that in 2004, that you told
18 your shareholders in your annual report -- which was 3211, at
19 page 6162.

20 A. Yes.

21 Q. Are you with me?

22 A. I am.

23 Q. You, at this point, were concerned that you could be shut
24 out of an important part of the market; right?

25 A. Can you point to the paragraph you're referring to.

1 Q. You say here that more individuals are using nonPC devices
2 to access the Internet and versions of your Web search
3 technology developed for these devices, and they may not be
4 widely adopted for users in these devices. Right?

5 A. That's correct.

6 Q. And this was something that was something you were focused
7 on. You actually signed this annual report; right?

8 A. Uhm, I did.

9 MR. BICKS: Yeah. And if we can just go to the
10 next -- the top of the next page, Trudy.

11 BY MR. BICKS

12 Q. And you say here at the top, "If we are unable to attract
13 and retain a substantial number of alternative device users to
14 your Web search services or if we're slow to develop products
15 and technologies that are more compatible with nonPC
16 communication devices, we will fail to capture a significant
17 share of an increasingly important portion of the market."

18 That's something you were concerned about; right?

19 A. Yes.

20 Q. You didn't want to fail to capture a significant share of
21 the market, did you?

22 A. Of course not.

23 Q. And, in fact, that was one of the reasons that Google
24 brought Android; correct?

25 A. At the time it was not clear to me whether Android would

1 solve these problems or solve a different problem.

2 Q. Well, I want to show you Trial Exhibit 31.

3 Did you have concerns that you would get locked out of the
4 market?

5 A. Locked out of what market?

6 Q. The mobile smartphone market, the market we're talking
7 about in this case.

8 A. I was not too worried about it. I was worried about the
9 specifics of the iPhone.

10 Q. You were worried about the iPhone because, in your
11 words, you were under a lot of pressure; right?

12 A. No. I was on the Board of Apple. So I knew exactly what
13 was going on with the iPhone.

14 Q. You knew exactly what was going on with the iPhone
15 because you were on that Board, didn't you?

16 A. Yeah.

17 Q. And you knew that the Apple iPhone was a competitive
18 product to Android, didn't you?

19 A. Uhm, that's actually not correct.

20 So the original version of Android was a different kind of
21 mobile platform. And when the iPhone -- I have to explain it
22 in context.

23 When Apple invented the iPhone, the Android did not have
24 a UI of the kind that you're thinking of today. So there was a
25 big initiative to try to add that.

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1 So all of these conversations were not about -- they were
2 for earlier ideas of what phones would be. We didn't know it
3 would look like a smartphone today.

4 **THE COURT:** What does "UI" mean?

5 **THE WITNESS:** Sorry. User interface.

6 **BY MR. BICKS**

7 **Q.** Yeah. User interface is -- I'm not a technology person,
8 but that's like a touchscreen. That would be an example of a
9 user interface?

10 **A.** Yes, that would be an example.

11 **Q.** Right. And, actually, do you know that in that HTC Pro
12 Phone of 2008, do you know it had a touchscreen on it?

13 **A.** I do.

14 **Q.** It does; right?

15 **A.** Yeah.

16 **Q.** And back to the Apple question. You did get worried about
17 Apple at some point; right?

18 **A.** Well, I was on the Apple Board. So as it became clear
19 that the iPhone would be successful, what I did was I recused
20 myself. So at some point I lost information about the
21 iPhone.

22 **Q.** All right. You, in your words, were under a great deal of
23 pressure because Apple came out.

24 **A.** Uhm --

25 **Q.** The Apple iPhone.

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1 **A.** Again, if we go back to our timeline, it became clear the
2 iPhone would do well, and it was important that we have a good
3 competitor.

4 **Q.** Well, your words, you were under pressure; right? You
5 said that?

6 **A.** Strategic pressure.

7 **Q.** Strategic pressure.

8 **A.** Yeah.

9 **Q.** And in TX 31, this is one of your company presentations on
10 Android? You see that; right?

11 **A.** I do.

12 **MR. BICKS:** And I move 31 in evidence.

13 **MR. VAN NEST:** I'm not sure the witness has seen this,
14 Your Honor. But if he has, I have no objection.

15 **THE COURT:** Have you seen 31?

16 **THE WITNESS:** I don't believe I've seen it.

17 **THE COURT:** Show him 31.

18 **MR. BICKS:** He has it.

19 **THE WITNESS:** No, I'm looking at it.

20 **THE COURT:** You have it.

21 **THE WITNESS:** I'm looking at it now.

22 Could you direct me --

23 **BY MR. BICKS**

24 **Q.** It's a corporate record of your company; right?

25 **A.** I'm not sure what it is. But if you could direct me --

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1 **Q.** Look on the front page of it. It says what it is.

2 **A.** What it says is Android One to One; Introduction to
3 Android; and Android Partnerships.

4 **Q.** All right.

5 **A.** It says, "Google Confidential and Proprietary." So I
6 would infer that this is a Google document.

7 **THE COURT:** All right. That's good enough. Received
8 in evidence.

9 (Trial Exhibit 31 received in evidence.)

10 **BY MR. BICKS**

11 **Q.** Let's go to page 12. I asked you did you see any
12 documents in your corporate files you were concerned about
13 getting locked out.

14 Had you seen this before?

15 **A.** I don't believe I've seen this document.

16 **Q.** All right. Now, you do agree that you wanted to have as
17 quick a time to market as you could for Android; isn't that
18 true?

19 **A.** Yes.

20 **Q.** And you also know -- you know who Mr. Larry Page is, do
21 you not?

22 **A.** Yes, I do.

23 **Q.** And do you recall that he informed you and a group of
24 people working on the Android Project that he was disappointed
25 at Android's timing? You remember that?

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1 **A.** I don't recall specifically, but it's certainly plausible.

2 **Q.** This is Exhibit 401. Do you know what the EMG is?

3 **A.** Yes.

4 **Q.** Were you on it?

5 **A.** I was.

6 **Q.** It's the executive management group at your company;
7 correct?

8 **A.** That is correct.

9 **MR. BICKS:** Move 401 into evidence.

10 **MR. VAN NEST:** No objection, Your Honor.

11 **THE COURT:** Received.

12 (Trial Exhibit 401 received in evidence.)

13 **BY MR. BICKS**

14 **Q.** These are notes of a mobile strategy meeting. And you
15 were there, weren't you?

16 **A.** It appears so, yes.

17 **Q.** And do you see, I asked you if Mr. Page was disappointed
18 in Android's timing. Do you recall that?

19 **A.** I have no recollection of this.

20 **Q.** Let me see if this will help you. Do you see the "Larry"
21 in this document?

22 **A.** I see the notes state that. I don't recall him -- I don't
23 recall this specifically.

24 **Q.** So who's the Larry and who's the Eric in these
25 confidential notes?

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1 **A.** I would assume that's Larry Page, and that Eric is myself.

2 **Q.** So what's Larry saying?

3 **A.** As I said, I didn't take the notes.

4 **Q.** He's saying he's disappointed in Android's timing; right?

5 Right? Do you see that?

6 **A.** Again, all I can state is that I see the sentence that

7 says that.

8 **Q.** Yeah. And you remember sentiments like this? Or you

9 don't remember that?

10 **A.** I honestly don't remember the meeting.

11 **Q.** But you remember the conversation with Mr. Schwartz over

12 in the lunch room?

13 **A.** Yes. I see one occasionally and the other every day.

14 **Q.** Yeah. And -- but the timing here was important; right?

15 And, I mean, to use your words, it was a big bet and the

16 schedules were tight.

17 Do you remember saying that?

18 **A.** It's perfectly plausible I said it.

19 **Q.** Let's make it, instead of plausible --

20 **A.** Sure.

21 **Q.** -- see what actually happened. 5321. It's an email

22 you're on; right?

23 **A.** Yes, I see that.

24 **Q.** You wrote it, didn't you?

25 **A.** Yes.

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1 **Q.** So let's put it in evidence, please, and put it on the
2 screen.

3 **THE COURT:** Any objection?

4 **MR. VAN NEST:** No objection, Your Honor.

5 **THE COURT:** Received.

6 (Trial Exhibit 5321 received in evidence.)

7 **BY MR. BICKS**

8 **Q.** Item G. Your words?

9 **A.** "Android is a big bet and the schedules are very tight;
10 will we actually deliver all that we need."

11 **Q.** And what date is this?

12 **A.** This is 2007.

13 **Q.** And when you say "a big bet," how was it a big bet?

14 **A.** Well, we're putting lots of resources behind it.

15 **Q.** Lots of resources and a potential for big upside; right?

16 **A.** Or failure. It's how we operate.

17 **Q.** I'm sorry?

18 **A.** Or failure. Google operates on big bets. This is a big
19 bet. Some fail; some succeed.

20 **Q.** And you were asked about discussions with Mr. McNealy. It
21 was 205, was your exhibit.

22 **MR. BICKS:** Can we pull 205 up.

23 (Document displayed.)

24 **BY MR. BICKS**

25 **Q.** Do you remember what he said to you, that he was worried

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1 about revenue submarining --

2 A. I do.

3 Q. -- up at the top-third line?

4 A. I do.

5 Q. What does it mean, the word, when a revenue submarines?
6 What does that mean?

7 A. I assume it means going down.

8 Q. And that was a concern that he had?

9 A. That's what he's saying in the email, yes.

10 Q. And that's what you knew; right?

11 A. I'm sorry?

12 Q. You knew that; right?

13 A. I'm sorry, I knew what?

14 Q. You knew that he and Sun were concerned about revenue
15 submarining; right?

16 A. I got the message, yes.

17 Q. And those revenues -- because you knew, actually, that
18 Sun, at this time, was in how many smartphones? I'm not going
19 to fuss about what kind of phones.

20 How many mobile phones were they in?

21 A. I don't know.

22 Q. I think you were shown an exhibit on that. I'm going to
23 show you an exhibit on that, that was in your direct, in a
24 minute.

25 Do you know, sir -- I mean, one of the reasons you were

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1 talking to Sun is they were a leader in the mobile phone
2 market; right?

3 A. Uhm, again, I would disagree with your -- the way you
4 stated it.

5 Q. Well, how many mobile phones was Sun in, in, say, 2006?
6 Do you know?

7 A. Again, you used the phrase "leader in mobile phones." Sun
8 didn't make mobile phones.

9 Q. Yeah. And, actually, because they licensed the Java
10 platform into mobile phones; right?

11 A. So to be technically precise, they had partners who had
12 Java inside their phones.

13 Q. Yeah. And you have Java inside your phones; right?

14 A. We have our implementation of the Java Language and APIs
15 in our phones, yes.

16 Q. And you received communications during this time period
17 about Sun's position in the mobile phone market; right?

18 A. I'm sure I did, but I don't remember them.

19 Q. And you just tell me, sir, how many mobile phones was Java
20 licensing to, by Sun, at the time that you were talking about
21 them in -- with them in 2005-2006?

22 A. Uhm, I remember his revenue number but not the number of
23 phones.

24 Q. You have no ballpark idea for us today about the number of
25 phones?

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1 **A.** I'm sure it's in one of your documents.

2 **Q.** Let me ask you about statements that you make on earnings
3 calls. Right? You do that from time to time; right?

4 **A.** Yes.

5 **Q.** And do you remember making a statement that, "The open
6 source approach means that we give the software away, which is
7 always paradoxical."

8 Remember making that statement?

9 **A.** Sounds right.

10 **Q.** And when you made that statement -- well, let me show you
11 the statement and see if this helps us.

12 **MR. BICKS:** Trudy, this is 951.

13 **BY MR. BICKS**

14 **Q.** And this is from an earnings call. You're familiar with
15 this; right?

16 **A.** I'm familiar with earnings calls, yes.

17 **Q.** Uh-huh. Here's a transcript of 951.

18 Do you recall this?

19 **A.** I'll have to review it. Can you identify the area you'd
20 like me to review?

21 **Q.** I'm looking at transcript of this at pages 8 through 9 of
22 the earnings call.

23 Do you see that?

24 **A.** I do.

25 **Q.** And do you see there's a statement from you as the

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1 chairman and the CEO? Let me move this into evidence first.

2 Do you see that?

3 **A.** Yes, I do.

4 **THE COURT:** Any objection?

5 **MR. VAN NEST:** No objection, Your Honor.

6 **THE COURT:** Received in evidence.

7 (Trial Exhibit 951 received in evidence.)

8 **BY MR. BICKS**

9 **Q.** And you see in there -- and maybe we can put it up on the
10 screen, 951.

11 (Document displayed.)

12 **Q.** And we'll go to 8 and 9.

13 Do you see that, starting with the latter? It's down
14 there at the bottom.

15 **MR. BICKS:** Let's go over to the next page, Trudy.

16 **THE WITNESS:** Yes, I do. Yes, I see it.

17 **BY MR. BICKS**

18 **Q.** And you say here, "So in the open source approach, that
19 means we give the software away, but that's always paradoxical.
20 People say, How do you make money from that?" Right? Remember
21 you were talking about that on the earnings call?

22 **A.** Yes.

23 **Q.** And you explained how you make money even though you give
24 the software away; right?

25 **A.** Yes.

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1 Q. Right. And so we're very, very clear, the software that
2 you were giving away here for free, that software had in it
3 those API packages; right?

4 A. Again, we -- the implementations that we made, we licensed
5 freely. That's -- "giving away" is vernacular for we license
6 it freely.

7 Q. That may be your vernacular. But I'm going to break it
8 down easy. You give it away for free; right? People don't pay
9 for it; right?

10 A. Again, I'm trying to be very precise.

11 Q. Right.

12 A. There is a license that allows you to use it without
13 having to pay for it.

14 Q. All right. So when you don't pay for it, can we agree
15 that's for free?

16 A. Subject to the terms of the license, yes.

17 Q. All right. And within what you give away for free, it's
18 the declaring code and the structure, sequence and organization
19 of the 37 packages that we're here in this courtroom talking
20 about; right?

21 A. Yes.

22 Q. All right. And so what you're explaining here is, We give
23 the software away, but we make money from that.

24 And you're explaining how you do it here; right?

25 A. Uh-huh, yes.

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1 Q. And you're explaining to the shareholders of your
2 corporation the truth; correct?

3 A. I do, yes.

4 Q. And you say here that, "The evidence is that the people
5 who use Android search twice as much as everything else";
6 right?

7 A. Yes.

8 Q. And so, clearly, there's more revenue associated with
9 those searches. And you say that; right?

10 A. I do.

11 Q. And then you say, "One other thing, of course, is if
12 they're using Android operating systems the revenue that we
13 share and the searches are shared with the operator but not
14 with anybody else." Right?

15 A. Yes.

16 Q. And you didn't share any of those revenues with Oracle,
17 did you?

18 A. No.

19 Q. And you say here "it's more lucrative," do you not?

20 A. I do.

21 Q. And "Not only is there more searches, and there's more
22 ads, but it's also more lucrative." Your words; true?

23 A. Yes.

24 Q. So on that basis alone, you say Android is what?

25 A. It's "hugely profitable."

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1 Q. And you use the word "hugely." What do you mean by
2 "hugely"?

3 A. Well, I'm trying to promote our platform.

4 Q. You're trying to promote your platform. But you're doing
5 it on an earnings call, which is a public forum that's governed
6 by the regulations of the government and the securities rules
7 and things of that nature; right?

8 A. Of course it is.

9 Q. Right. And it's got to be truthful; right?

10 A. Yes, of course.

11 Q. And so when you say the word "hugely," tell us what you
12 mean by "hugely."

13 A. Well, in general, Google is a very profitable company.

14 But it's important to state that these profits are coming
15 out of our Google Search.

16 (Reporter interrupts.)

17 A. They are coming out of our Google Search, which is where
18 our money is made, as I said earlier.

19 Q. What you say here is, the more people who use Android,
20 they search twice as much as anything else; right?

21 A. I am.

22 Q. Yeah.

23 And I was asking you questions about what you knew about
24 Sun.

25 Let me show you Trial Exhibit 22, please.

SCHMIDT - CROSS / BICKS

1 22 is a document that you've seen before; right? EMG,
2 executive --

3 **A.** I believe I've seen this, yes.

4 **MR. BICKS:** Move 22 into evidence, please.

5 **MR. VAN NEST:** No objection, Your Honor.

6 **THE COURT:** Received in evidence.

7 (Trial Exhibit 22 received in evidence.)

8 **BY MR. BICKS**

9 **Q.** Remember I was asking you information about Sun, and you
10 were a little hazy on the details; right?

11 **A.** Uh-huh.

12 **Q.** So let's go to 22, and go to page 3.

13 **MR. BICKS:** Put it on the screen, please.

14 (Document displayed.)

15 **BY MR. BICKS**

16 **Q.** "Android/Sun final approval." That's the title; right?

17 **A.** It is.

18 **Q.** And if we go to page 3, there was a question posed: "Who
19 are they?" And the question, they were talking about Sun
20 Microsystems.

21 Does that refresh your memory about what you knew at that
22 time?

23 **A.** I don't actually remember being in this meeting, but I'll
24 accept that this -- it's possible I was in this meeting because
25 this is -- this is what would have been presented to the group

1 management.

2 Q. "Who are they?" This is folks -- you're trying to make
3 business decisions, and you want to have truthful information;
4 right?

5 A. Of course.

6 Q. Yeah. And when the question is, "Who are they?" you're
7 talking about Sun products and services for network computing.
8 It says, "Java dominates the wireless industry."

9 Is that your understanding?

10 A. Well, those are their words, whoever wrote this document.

11 Q. And do you know who wrote it?

12 A. Uhm, I will check. The authors are on the first page.
13 Andy Rubin, Tim Lindholm, Chris DiBona, Ethan Beard, Frank
14 Mayorga.

15 Q. And they know what they're talking about; right?

16 A. I would assume so, yeah.

17 Q. Yeah.

18 So back to this, "Who are they?" it was Sun. And they
19 dominated the wireless industry; right?

20 A. Again, I would not use the word "dominate." But this is
21 what they wrote.

22 Q. Well, I don't want to fuss about it. These are the people
23 who were working on the project at your company; right?

24 Mr. Rubin was in charge of it; right?

25 A. Again, as CEO, you get a lot of documents. This is their

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1 opinion. And I'll accept it as what they thought.

2 **Q.** Yeah. And you say here "market presence." Or you don't
3 say, you see. I was asking you questions about the number of
4 phones that Sun licensed Java into. Remember I was asking you
5 about that?

6 **A.** Yes.

7 **Q.** So what does this say in your internal corporate document
8 about how many phones?

9 **A.** It says 1 billion Java-embedded handsets.

10 **Q.** And what about carrier deployments, how many?

11 **A.** 180 carrier deployments.

12 **Q.** And how many phones was Google in at this time, and
13 Android?

14 **A.** 2006. So Android would not have been released yet.

15 **THE COURT:** We're going to break in four minutes.

16 **MR. BICKS:** I'm going to finish, Judge.

17 **BY MR. BICKS**

18 **Q.** You have given interviews about how Android makes money;
19 right?

20 **A.** I have.

21 **Q.** And you're given interviews about how you have personal
22 information about people and how that fits into your business.
23 Do you remember that?

24 **A.** You'd have to give me a reference.

25 **Q.** Yeah. 6053.

SCHMIDT - CROSS / BICKS

1 Remember being interviewed by Jim Cramer, the guy -- the
2 stock guy?

3 **A.** I remember him.

4 **Q.** Yeah. And you were on that show, Mad Money. Remember?

5 **A.** I do.

6 **Q.** 6053.

7 **THE COURT:** Isn't he the one that always seemed to
8 have too much caffeine?

9 (Laughter)

10 **THE WITNESS:** He's very excitable.

11 Can you direct me to --

12 **BY MR. BICKS**

13 **Q.** Yeah, 6053, page 2 to 3.

14 **A.** Page 2 to 3. Okay. Thank you.

15 **MR. BICKS:** And I move 6053 into evidence.

16 **MR. VAN NEST:** Objection. The article is hearsay. I
17 don't have a problem with him asking about Mr. Schmidt
18 statements, but the article is hearsay.

19 **THE COURT:** Sustained so far.

20 **BY MR. BICKS**

21 **Q.** Well, I'm focusing on, you see your statement there at
22 page 2 to 3?

23 **THE COURT:** Take a look at it and tell us whether or
24 not you can vouch for it being your statement.

25 **THE WITNESS:** I am assuming this is an accurate

SCHMIDT - CROSS / BICKS

1 transcript, this is a truthful transcript of what I said.

2 **THE COURT:** All right. Based on that, I will allow it
3 into evidence.

4 (Trial Exhibit 6053 received in evidence.)

5 **MR. BICKS:** 2053.

6 **THE COURT:** I thought you said 6053.

7 **MR. BICKS:** I'm sorry, 6053.

8 Thank you, Your Honor.

9 **BY MR. BICKS**

10 **Q.** So this is the interview you gave on Mad Money; right?
11 Remember that?

12 **A.** I do.

13 **Q.** And page 2 to 3 you say here -- right now he's asking you
14 a question, predominantly desktops. But countries like
15 Japan -- it goes on to the top. Is that going to be up to
16 snuff? And can you make as much money in mobile computing
17 because of the cell phone companies?

18 Right?

19 **A.** Yes.

20 **Q.** Do you see that?

21 **A.** I do.

22 **Q.** And you say, "We can make more in mobile than desktop
23 eventually. The reason, because the mobile computer is more
24 targeted. Think about it. You carry your phone everywhere.
25 It knows all about you. We can do a very, very targeted ad.

SCHMIDT - CROSS / BICKS

1 Over more time, we will make more money for mobile
2 advertising."

3 Right?

4 **A.** Yes.

5 **Q.** Those were your words.

6 And do you recall saying that it's Google's policy --
7 well, let me back up for a minute.

8 Do you recall being interviewed and using the phrase
9 "creepy"?

10 **A.** Yes, I remember an interview where that was -- where I
11 answered that question.

12 **Q.** And do you recall in that interview you said that it's
13 Google's policy about a lot of these things is to get right up
14 to the creepy line, but not cross it.

15 Remember that?

16 **A.** I do.

17 **Q.** And you remember saying, "We know where you are. We know
18 what you're doing. And we know what you're thinking." Do you
19 remember that?

20 **A.** That was in a different context.

21 **Q.** But you said that; right?

22 **A.** Again, you're picking things out of very long interviews.
23 But yes. You're taking a sentence out of paragraphs.

24 **Q.** Well, you remember that you said, "That's what I call the
25 creepy line. And the Google policy about a lot of these things

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1 is to get right up to the creepy line but not cross it."

2 **A.** And you're asking out of a completely different context.

3 **Q.** Well, I'll actually play the tape for you, and maybe it
4 will help with the context.

5 **A.** No, no, I remember the context.

6 **Q.** Yeah.

7 **A.** Maybe you should ask a question.

8 **THE COURT:** We're at 1:00 o'clock. I'll let you ask
9 one more question. We can resume tomorrow.

10 **MR. BICKS:** All right. Your Honor. Maybe we should
11 resume.

12 **MR. VAN NEST:** Your Honor, I don't think there's a lot
13 more with this witness.

14 **THE COURT:** We're not going to go past 1:00 o'clock.
15 You lawyers have -- this jury has got -- we're not going to
16 make you stay five more minutes.

17 Remember the admonition. We will see you back here
18 tomorrow. Thank you for your time and attention.

19 **THE CLERK:** All rise.

20 (Jury out at 1:00 p.m.)

21 **THE COURT:** Be seated.

22 The witness is still on cross-examination, so the rule
23 applies.

24 Do you understand what I mean?

25 **MR. VAN NEST:** Of course.

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1 **THE COURT:** All right. So we will resume then.

2 Listen, I have to tell you, I am strict about the
3 1:00 o'clock thing. I would have given you one extra minute --
4 that's it -- to finish your witness.

5 I know this witness is a busy man, but so is the jury.
6 And right now the jury's convenience counts for a lot more. So
7 we're not going to detain the jury when I told them they're
8 going to get out of here at 1:00 o'clock every day. Five
9 minutes would be too much. I'm not going to do five minutes.

10 So there we are. So you can step down, but be back at
11 7:30 in the morning, Mr. Schmidt. Thank you so far, but we
12 will have to see you back here tomorrow. You're still on
13 cross-examination.

14 Anything -- anything the lawyers need me for now?

15 **MR. BICKS:** Nothing, Your Honor.

16 **THE COURT:** How about over there?

17 **MR. VAN NEST:** Yes, Your Honor.

18 **THE COURT:** What's that? Do you want the witness here
19 or not?

20 **MR. VAN NEST:** No.

21 **THE COURT:** Should the witness be here?

22 **MR. VAN NEST:** No.

23 **THE COURT:** Mr. Schmidt, you need to give those to
24 counsel and step out in the hallway. And we'll see you at 7:30
25 in the morning. Have a good day.

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1 **THE WITNESS:** I will see you then.

2 **MR. VAN NEST:** This doesn't pertain to the witness in
3 particular, Your Honor. But -- and I hate to bring this to the
4 Court's attention, but I've tried to deal with it otherwise and
5 I can't.

6 Your rules require that if we provide our direct exam
7 exhibits two days ahead, they are required to provide
8 cross-exam exhibits a day ahead. They've been doing it. The
9 problem is, I think the rule requires that you give a
10 good-faith list of what you're going to use on cross-exam.

11 We've been getting lists for witnesses that exceed a
12 hundred exhibits. I instructed my team, and we've been giving
13 our direct exam list very close to what we plan to use. Maybe
14 a couple of extra just in case. That's what I did with
15 Mr. Schmidt.

16 On Mr. Schmidt, they disclosed more than 50 cross
17 exhibits. Mr. Rubin, 115. And, as you can see, we've used
18 maybe a dozen.

19 I've tried to do this without the Court's guidance, but
20 it's to the point where my staff is getting taxed every night
21 with these massive dumps of more than a hundred cross exhibits.
22 And I'd like to have some clarity on what the rule is so that
23 we don't have to be sorting through the haystack to find the
24 needle, which is what I think is happening to us.

25 **THE COURT:** 50 is not so many.

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1 **MR. VAN NEST:** 115?

2 **THE COURT:** No. You said 50 for this witness. Did I
3 mishear?

4 **MR. VAN NEST:** No, you didn't. More than 50. That's
5 right. They've used a dozen, maybe.

6 On Mr. Rubin, I've got 115 exhibits for cross.

7 **THE COURT:** I don't know the answer to this. What did
8 I do in the first trial? I've had this problem before. And I
9 have solved it how?

10 **MR. VAN NEST:** In the first trial we had a different
11 problem. In the first trial the Oracle side was vastly
12 over-designating depositions. And you said, If you do that,
13 I'm going to make you play the whole thing. And then the
14 designations got cut down.

15 I, frankly, don't know, apart from an admonition or some
16 sort of clear rule, what to do about this problem. I just know
17 that it's not fair if we're providing our direct exhibits,
18 which are, you know, a dozen or 20, whatever we're going to use
19 with the witness, to get 115 cross-exam exhibits. The staff
20 has to go through, sort, figure out which of the actual ones we
21 are going to use.

22 We have two binders the size of a birthday cake for
23 Mr. Schmidt. And, you know, there's got to be some limit on
24 this. Otherwise, it's just unfair to the staffs. And it's
25 sort of hiding the ball.

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1 **THE COURT:** Why don't we have a rule that you don't
2 have to show any cross-examination documents? Then everybody
3 will have trial by ambush. Both sides could just use anything
4 you wanted.

5 If you want to suspend it and you both agree, then I would
6 be okay with that. But then what will happen is they will pull
7 out a document and then you'll be over there saying, Wait a
8 minute, wait a minute, I got to find it. I didn't know they
9 were going to use this. And then there will be a delay. It
10 will burn up jury time doing that.

11 So I --

12 **MR. VAN NEST:** I don't think that's the answer, Your
13 Honor. I think there's got to be some kind of good-faith
14 requirement here.

15 And where I'm disclosing a dozen exhibits for
16 Mr. Schmidt's direct, I shouldn't have to sift through 50 or 55
17 cross exhibits. When we're disclosing 20 for Rubin, we
18 shouldn't have to go through 115.

19 I think Your Honor's rules say the exhibits you plan to
20 use, what you actually plan to use. So I understand on cross
21 that you can't predict perfectly what you're going to use. But
22 that doesn't mean you should be able to disclose 115, because
23 there may be 10 in there that eventually become relevant.

24 **THE COURT:** Let's hear from the other side.

25 **MS. HURST:** Your Honor, Mr. Rubin is on a lot of

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1 documents. He ran Android from the beginning, for about 12
2 years.

3 The documents that we listed on the list for Mr. Rubin
4 were all in my outline at the time. I hope not to have to
5 offer nearly that many, but Mr. Rubin has in the past proven to
6 be a witness that is somewhat hard to pin down, Your Honor.
7 And I am, therefore, prepared with a document for every single
8 point in my outline. This was absolutely done in good faith.

9 And the Court has indicated in the past -- we've studied
10 the Court's rules from the first trial -- that it prefers
11 disclosure to impeachment. And, therefore, I've held back only
12 one or two true impeachment documents and disclosed everything
13 else that in that moment we believed that we would use in the
14 outline, a couple of days ago.

15 And I'll be honest with, Your Honor, I haven't eliminated
16 much since. So Mr. Rubin is a very important witness. The
17 Court noted that there may be 200 documents that come into
18 evidence in this case. He's probably on 150 of them, Your
19 Honor.

20 **MR. VAN NEST:** Your Honor, if that were the rule, he's
21 on a document, then we wouldn't have any need for the
22 disclosure. That means you just deliver everything he's
23 written. That's not the rule.

24 **MS. HURST:** Well, we certainly didn't do that. He's
25 on much, much more than was delivered.

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1 **THE COURT:** I don't have an answer for you now. I'm
2 going to think about it.

3 **MR. VAN NEST:** Thank you, Your Honor.

4 **THE COURT:** What else can I help you with?

5 **MR. BICKS:** Can I just, Your Honor, on the -- he was
6 talking about two different witnesses, so we're very clear. I
7 handled the cross-examination, as you can see there.

8 I would suggest one shortcut, which I mentioned to
9 Mr. Van Nest. And I think there were about 40 to 50 documents
10 used for cross. You can see I probably only used ten of them;
11 that a big pile of them was the Google annual reports that have
12 figures in there that we need for our damages case, to have
13 them into evidence belt and suspenders.

14 If he'd agree that those annual reports are authentic
15 corporate records and in, then that would really shortcut a lot
16 of time and make things easier.

17 I would ask him now to stipulate to the admission of his
18 annual reports rather than have a sponsoring witness and take
19 time. But that's one of the reasons we have to put those
20 exhibits on the exhibit list. And that's a good example. He
21 can shortcut it. And if he can do it now, that would be great.

22 **THE COURT:** How many have you designated for other
23 witnesses? For example, on that list of seven, what were the
24 number of cross-examination documents you designated?

25 **MR. BICKS:** We're only up for the first two yet so

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1 far.

2 **MS. HURST:** No, we've designated Mr. Bloch.

3 **MR. BICKS:** We did Schwartz too.

4 **MS. HURST:** Well, eight documents for --

5 **MR. BICKS:** I've got, probably 15 to 20 for Schwartz.

6 **MS. HURST:** Eight for Mr. Bloch.

7 **THE COURT:** It is true that Rubin is a hot item for
8 Oracle. They are looking forward to beating up on him.

9 (Laughter)

10 **THE COURT:** And they are going to have a lot of
11 documents. So maybe -- maybe he's the worst possible case, and
12 as we go along it won't be quite as many designations.

13 **MR. VAN NEST:** That's what I'm hoping, Your Honor.
14 That's why I brought it up.

15 **THE COURT:** I'm going to think -- I've had this
16 problem in the past. I honestly can't remember how I solved
17 it. So I need to think -- see if I can reconstruct it. There
18 is a possible way, if I can remember it.

19 All right. Anything else I can help you with?

20 **MR. VAN NEST:** That's all we have, Your Honor.

21 **THE COURT:** I have a 2 o'clock criminal calendar. I
22 will need the tables. But you can leave all your other stuff
23 here.

24 **MR. VAN NEST:** Excuse me, Your Honor.

25 **MR. PAIGE:** Your Honor, in ECF 1839, the order you

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1 issued relating to reports relating to the 62 class concession
2 by Oracle, it said that it was to be done on Thursday,
3 May 11th, at noon. And since May 11th is tomorrow, we weren't
4 sure whether that meant to be Wednesday, May --

5 **THE COURT:** I thought this was all solved with Judge
6 Kim.

7 **MR. PAIGE:** No. This is your order relating to
8 updating of expert reports or supplementation of expert
9 reports.

10 **THE COURT:** What's your question then?

11 **MR. PAIGE:** It said Thursday, May 11 is when they are
12 due. But tomorrow is May 11th. So we wanted to clarify
13 whether it was supposed to be Wednesday, May 11, or Thursday,
14 May 12.

15 **THE COURT:** You mean, I got the number of the day
16 wrong?

17 **MR. PAIGE:** Right.

18 **THE COURT:** What day do you want? Tomorrow?

19 **MS. HURST:** Either is fine with us.

20 **MR. PAIGE:** Sure. Tomorrow is fine, Your Honor.

21 **THE COURT:** That's fine. Tomorrow night is fine.

22 **MR. PAIGE:** Thank you, Your Honor.

23 **MS. HURST:** Thank you.

24 **THE COURT:** Agree on the time, though, now, the two of
25 you. How about midnight? 5:00 p.m? Just agree.

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(Counsel confer off the record.)

MS. HURST: 8:00 p.m., Your Honor.

THE COURT: Agreed?

MR. PAIGE: Agreed.

THE COURT: Very well. Thank you.

MR. PAIGE: Thank you, Your Honor.

THE COURT: See you tomorrow at 7:30.

(At 1:11 p.m. the proceedings were adjourned until
Wednesday, May 11, 2016.)

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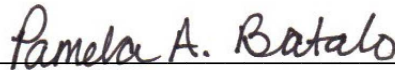
CERTIFICATE OF REPORTERS

We certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: May 10, 2016



Katherine Powell Sullivan, CSR #5812, RMR, CRR
U.S. Court Reporter



Pamela A. Batalo, CSR No. 3593, RMR, FCRR
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